(25,671)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 841.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

JOHN SEALY, SEALY HUTCHINGS, GEORGE SEALY, JR., AND H. O. STEIN, PARTNERS AS HUTCHINGS, SEALY & CO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 10, 1917.

a In the Supreme Court of the State of Kansas.

No. 19918.

HUTCHINS, SEALY & Co., Appellee,

v.

M., K. & T. R'L'Y Co., Appellant.

Be it remembered, That on the 12th day of January, 1915, there was filed in the office of the clerk of the Supreme Court of the state of Kansas, a certified copy of Notice of Appeal and the Proof of Service thereof, in the above entitled case, which Notice of Appeal, and endorsements thereon is in words and figures as follows to-wit:

b Filed Jan. 12, 1915. D. A. Valentine, Clerk Supreme Court.

In the District Court of Labette County, Kansas, Sitting at Parsons.

No. 19918.

JOHN SEALY, SEAL HUTCHINS, GEORGE SEALY, JR., and H. C. STEIN, Partners as Hutchins, Sealy & Co., Plaintiffs,

vs.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Defendant.

Notice of Appeal.

To said plaintiffs, and New & Krauthoff, and F. M. Harris, Attorneys of Record for said plaintiffs:

Take Notice that the defendant, Missouri, Kansas & Texas Railway Company, appeals to the Supreme Court of Kansas from the ruling of the District Court refusing to render judgment in favor of the defendant, in refusing defendant a new trial, and from the final judgment rendered in said above entitled cause.

W. W. BROWN,
JAMES W. REID,
Attorneys for Missouri, Kansas & Texas Railway Company, Defendant.

c STATE OF KANSAS,
Labette County, ss:

W. W. Brown, of lawful age, being first duly sworn on oath deposes and says:

I am one of the attorneys of the Missouri, Kansas & Texas Rail-

way Company in the matter of the foregoing notice. I served a true copy of said notice upon F. M. Harris, one of the attorneys of record of said John Sealy, Sealy Hutchins, George Sealy, Jr., and H. C. Stein, partners as Hutchins, Sealy & Company, plaintiffs in the above entitled action, by delivering the same to said F. M. Harris, personally, in Parsons, Kansas, on January 7th, 1915.

W. W. BROWN.

Subscribed in my presence and sworn to before me this 7th day of January, 1915.

[SEAL.] HAZEL M. WRIGHT,
Notary Public.

My commission expires October 10, 1918.

No. 232. In the District Court of Labette County, Kansas, Sitting at Parsons. Hutchins Sealy et al., Pl't'fs, vs. M., K. & T. Ry. Co., Def't. Notice of appeal. Filed at Parsons Jan. 11, 1915. Niles Moore, Clerk Dist. Court, By Annie S. Arnold, Dep'y.

d No. 323.

THE STATE OF KANSAS,
Sixteenth Judicial District,
Labette County, Sitting at Parsons, ss:

I, Niles Moore, Clerk of the District Court of the Sixteenth Judicial District of the State of Kansas, sitting at Parsons, within and for the County aforesaid, do hereby certify the above and foregoing to be a true, full and complete copy of Notice of Appeal, in the case wherein John Sealy et al. is Plaintiff and M., K. & T. Ry. Co. is Defendant as the same remains on file in my office.

Witness my hand, and the Seal of said Court, Affixed at my office, in Parsons, this the 11th day of January, A. D. 1915.

[SEAL.] NILES MOORE,
Clerk of the District Court,
By ANNIE S. ARNOLD, *Deputy.*

(Endorsed:) 19918. In the District Court of Labette County, Kansas, Sitting at Parsons. Hutchins, Sealy & Co., Appellee, vs. M., K. & T. Ry. Co., Appellant. Certified copy of Notice of Appeal and Proof. Filed Jan. 12, 1915. D. A. Valentine, Clerk Supreme Court.

e Be it remembered, That on the 26th day of November, 1915, there was filed in the office of the clerk of the Supreme Court of the State of Kansas, an Abstract of Record prepared by the appellant, which abstract of the record is in the words and figures as follows, to-wit:

f Filed Nov. 26, 1915. D. A. Valentine, Clerk Supreme Court.

19918.

In the Supreme Court of the State of Kansas.

No. 19918.

JOHN SEALY, SEALY HUTCHINGS, GEORGE SEALY, JR., and H. O. STEIN, Partners as Hutchings, Sealy & Co., Appellees,

v.

MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY, Appellant.

Appeal from Labette County, Elmer C. Clark, Judge.

Abstract of Appellant.

W. W. Brown, and James W. Reid, of Parsons, Attorneys for Appellant.

1 In the Supreme Court of the State of Kansas.

No. 19918.

JOHN SEALY, SEALY HUTCHINGS, GEORGE SEALY, JR., and H. O. STEIN, Partners as Hutchings, Sealy & Co., Appellees,

v.

MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY, Appellant.

Abstract of Appellant.

The following is an abstract and reproduction of those portions of the record necessary to show the questions presented for review. This action was commenced in the district court of Labette County, Kansas, on March 29, 1905. The petition filed at that time was amended on two different occasions by interlineation. The following is a copy of the petition as amended:

2 (Omitting Caption.)

Petition.

The plaintiffs, John Sealy, Sealy Hutchings, George Sealy, Junior, and H. O. Stein, partners doing business as Sealy, Hutchings & Company, bring this action against the defendant, The Missouri,

Kansas & Texas Railway Company, and for their first cause of action, aver and say:

(*a*) That the defendant, The Missouri, Kansas and Texas Railway Company, is now, and was at all times hereinafter mentioned, a corporation duly organized and existing under the laws of Kansas, owning and operating a line of railroad through the County of Labette, and other counties in the State of Kansas, and in which County of Labette is located the principal office and place of business of said defendant company.

(*b*) That at all times from and after the 1st day of June, 1900, to and including the 14th day of December, 1901, J. H. Hutchings, George Sealy, Senior, John Sealy and H. O. Stein, were each and all citizens and residents of the State of Texas, and were
3 engaged in business in that state under the firm name of Hutchings, Sealy & Company, and were each and all partners in said business, and that on December 14th, 1901, George Sealy, Senior who was then a citizen and resident of the State of Texas departed this life, and thereupon, and by virtue of the laws of Texas, the title to the cause of action hereinafter pleaded vested in and passed to the remaining partners, J. H. Hutchings, Sealy Hutchings, John Sealy and H. O. Stein.

(*c*) Thereafter, for a valuable consideration, J. H. Hutchings assigned and transferred to John Sealy all his right, title and interest in and to the cause of action hereinafter pleaded.

(*d*) Thereafter John Sealy, Sealy Hutchings and H. O. Stein, being the owners of the cause of action hereinafter pleaded, did assign an interest therein to George Sealy, Junior, and did admit him as a member of the partnership in the firm of Hutchings, Sealy and Company, and the plaintiffs, John Sealy, Sealy Hutchings, George Sealy, Junior, and H. O. Stein, became and are partners as Hutchings, Sealy & Company.

(*e*) In June, 1900 and for a long time prior thereto, the defendant was operating a line of railway extending from Kansas
4 City, Missouri, to Galveston, Texas, and was engaged largely in the shipping of grain for export from Kansas City, Missouri, to Galveston, Texas. The plaintiffs were engaged in business at Galveston, Texas, and there was engaged in the grain business in Kansas City, Missouri, one J. K. Davidson doing business as J. K. Davidson & Company. The manner of doing business among the plaintiffs, the defendant and J. K. Davidson & Company was as follows: The defendant would issue to J. K. Davidson & Company, to Kansas City, Missouri, an instrument in writing commonly called a bill of lading, whereby it would acknowledge the receipt from J. K. Davidson & Company of one car of bulk wheat containing a certain number of pounds, and thereupon the defendant would deliver this bill of lading to J. K. Davidson & Company, and thereupon J. K. Davidson & Company would assign this bill of lading to the plaintiffs, and transmit the bill of lading to the plaintiffs at Galveston, Texas. And thereupon, on the faith and strength of these bills of lading, J. K. Davidson & Company would issue a draft upon the parties then doing business as Hutch-

ings, Sealy & Company, and these drafts would be deposited in a bank at Kansas City, Missouri, and upon presentation to the plaintiffs would, upon the faith and strength of the bills of lading so issued by the defendant and then in the possession of the parties doing business as Hutchings, Sealy & Company, be honored
5 and paid by the parties then doing business as Hutchings, Sealy & Company. This method of doing business was well known to the defendant, and resulted in a large increase of the shipments of grain made by J. K. Davidson & Company over the line of the defendant railway from Kansas City, Missouri, to Galveston, Texas. In this connection the plaintiffs aver that ordinarily the time occupied in transit by a car of grain from Kansas City, Missouri, to Galveston, Texas, would approximate two weeks, and that if the plaintiffs could not have paid any money to J. K. Davidson & Company until the grain actually arrived in Galveston, Texas, J. K. Davidson & Company could not have realized on the grain shipped by them over the line of the defendant railway from Kansas City, Missouri, to Galveston, Texas, until the period of two weeks would have elapsed. But by the method of doing business as aforesaid, which said method was well known to the defendant, it was possible for J. K. Davidson & Company to ship a car load of grain from Kansas City, Missouri, to Galveston, Texas, over the line of the defendant railway, and by placing a draft on the parties then doing business as Hutchings, Sealy & Company in a bank in Kansas City, Missouri, J. K. Davidson & Company would immediately realize on these drafts and would thereby be enabled to purchase other grain for shipment over the line of the defendant rail-
6 way from Kansas City, Missouri, to Galveston, Texas, and in this way the volume of business done by J. K. Davidson & Company over the line of the defendant railway was greatly increased.

(*f*) That in pursuance of the plan of doing business as hereinbefore alleged, at Kansas City, Missouri, on June 13th, 1900, the defendant issued its instrument in writing commonly called a bill of lading, whereby it stated that it had received of J. K. Davidson & Company, for shipment from Kansas City, Missouri, to Galveston, Texas, one car of bulk wheat containing 66,000 pounds, and did state that such wheat was loaded in the car of the defendant, No. 2361, which car of wheat was to be transported by the defendant from Kansas City, Missouri, to Galveston, Texas, and delivered to the order of J. K. Davidson & Company. A copy of said bill of lading is hereto attached, and made a part hereof, marked "A" Thereupon, this instrument in writing, commonly called a bill of lading, was assigned by J. K. Davidson & Company to the persons then doing business as Hutchings, Sealy & Company, and delivered to such persons at Galveston, Texas, who upon the faith and strength of the recitals contained in this bill of lading and in reliance thereon, and in reliance upon said bill of lading so issued in pursuance of said course of business, did then and there
7 advance and pay to J. K. Davidson & Company the sum of $660.00.

The said bill of lading was issued at Kansas City, Missouri, and was signed by F. A. Leland, who was at that time the assistant general freight agent of the defendant company, and whose name appears upon said bill of lading in writing and that he signed the same as such assistant general freight agent, being the duly authorized agent of the defendant company in that behalf. These plaintiffs were not informed and cannot state what position, if any, the said F. A. Leland now holds with the defendant company. These plaintiffs are not informed and cannot state the name of the person or persons who delivered said bill of lading to J. K. Davidson & Company.

(*g*) These plaintiffs aver that in truth and in fact the recitals contained in the bill of lading so issued by the defendant as hereinbefore pleaded, were false, and that in truth and in fact 66,000 pounds of bulk wheat were not loaded in car number 2361 of the defendant company by J. K. Davidson & Company, nor was any part thereof loaded in said car or in any other car of the defendant railway company, nor was such wheat ever received by the defendant from J. K. Davidson & Company, nor was such wheat transmitted from Kansas City, Missouri, and delivered to
8 persons then doing business as Hutchings, Sealy & Company, Galveston, Texas, or to any other person in their behalf, nor was such wheat ever delivered by J. K. Davidson & Company to the persons then doing business as Hutchings, Sealy & Company. These plaintiffs first learned of the untruthfulness of the statements in said bill of lading on June 21st, 1900.

The letters "SO" appear in writing upon said bill of lading and express the agreement of the parties that the shipment mentioned therein was consigned to shipper's order, which such meaning is well known and understood among all persons and railway companies engaged in the business of shipping grain or receiving grain by shipment, and were so used by the defendant railway company and J. K. Davidson, when written upon this bill of lading and were so understood by plaintiffs when said bill of lading was delivered to them.

(*h*) Thereupon, in June, 1900, J. K. Davidson, doing business as J. K. Davidson & Company, became insolvent, and unable to respond to the persons then doing business as Hutchings, Sealy & Company, and that by reason of the issuance of this false bill of lading and by reason of the advance by the persons then doing business as Hutchings, Sealy & Company to J. K. Davidson & Company, of the sum of $660.00, and by reason of the fact that
9 the grain had never been received by the defendant and had never been transmitted to the persons then doing business as Hutchings, Sealy & Company, such persons were damaged in the sum named.

(*i*) The plaintiffs further aver that in addition to the bill of lading hereinbefore pleaded, the defendant did on June 13th, June 14th, June 15th, and June 16th, 1900, issue twenty-six other bills of lading, making in all twenty-seven bills of lading issued by the defendant company to J. K. Davidson & Company, each and all

of which were false, as hereinbefore pleaded, and on the faith and strength of all of which the persons then doing business as Hutchings, Sealy & Company had advanced to J. K. Davidson & Company the sum of $17,460, but J. K. Davidson & Company were entitled to credits upon said amount reducing said amount to sixteen thousand and fifty-three and 5-100 dollars ($16,053.05).

Of this amount so advanced by the persons then doing business as Hutchings, Sealy & Company, there was collected of J. K. Davidson & Company through the assistance of the defendant herein, the sum of eleven thousand two hundred thirty-seven and 10-100 dollars ($11,237.10), with interest thereon to October 24th, 1902. This amount so named the defendant is entitled to have credited on the twenty-seven causes of action pleaded herein, to be pro rated
10 and applied in such manner as to the Court may seem proper.

(*j*) Plaintiffs aver that on June 30th, 1900, the persons then doing business as Hutchings, Sealy & Company instituted an action in the Circuit Court of Jackson County, Missouri, at Kansas City, a Court of competent jurisdiction in that behalf, wherein said persons then doing business as Hutchings, Sealy & Company were plaintiffs, and the defendant herein, The Missouri, Kansas & Texas Railway Company, was defendant. The general object and nature of this suit was to recover from the defendant the damages sued for in this action. A copy of the petition in said action is attached hereto marked "D." And, thereupon, in such action so commenced as aforesaid it was agreed that the persons then doing business as Hutchings, Sealy & Company, should have the right to accept of J. K. Davidson & Company forty (40) per cent of sixteen thousand fifty-three and 5-100 dollars ($16,053.05) so advanced by them as aforesaid to J. K. Davidson & Company in cash, and that J. K. Davidson & Company might execute to the persons then doing business as Hutchings, Sealy & Company, four promissory notes, each for the sum of $2,407.95, and due respectively six, twelve, eighteen and twenty-four months after date. This agreement was made by and between the persons then doing business as
11 Hutchings, Sealy & Company, and the defendant herein.

In accordance with such agreement, notes were thereafter executed, bearing date October 6th, 1900. Of the notes so executed the notes falling due six months and twelve months after date have been paid. The amounts paid on these two notes, in addition to the cash payment herein mentioned makes the total sum of $11,-237.10 referred to in the preceding paragraph of this petition.

In such agreement mentioned it was provided, among other things, that the case hereinbefore mentioned should be continued from term to term and should not be pressed for trial by the plaintiffs herein unless J. K. Davidson & Company should make default in the payment of the notes hereinbefore mentioned, in which last named even the plaintiffs should have the right to press the case to trial and final disposition. Thereafter, on June 5th, 1902, it was agreed by the defendant herein that the note executed October 6th, 1900, and falling due April 6th, 1902, might be extended for a period of six months to and including October 6th, 1902 and

thereafter it was further agreed that the note falling due eighteen months after date and which had been extended as above mentioned, should be extended for a period of six months from October 6th, 1902. Each and all of said agreements hereinbefore mentioned were executed by and between the parties then doing business as Hutchings, Sealy & Company, and the defendant herein, The Missouri, Kansas & Texas Railway Company, and until April 6th, 1903, the date on which the last extension of these notes expired, the plaintiffs herein could not have instituted this action against the defendant. The action so commenced in the Circuit Court of Jackson County, Missouri, was by said Court dismissed, without prejudice to a new action, upon the motion of the plaintiffs herein. Copies of each and all of said agreements are hereto attached marked B. and C. respectively.

By reason of which the plaintiffs sustained damage in the sum of $660.

EXHIBIT "A."

Form 1132. 5-19-100M.

Missouri, Kansas & Texas Railway Company.

KANSAS CITY, Mo., June 13, 1900.

Received from J. K. Davidson & Co. the packages said to contain articles named below, and marked and numbered as per margin to be transported over the line of the Missouri, Kansas & Texas Railway under the following conditions, and the general rules and regulations of this Railway Company's published tariffs. If the destination of said packages be located on the line of the Missouri, Kansas & Texas Railway, then the Missouri, Kansas and Texas Railway Company hereby agrees to deliver same at destination after payment of proper charges by said consignee; but if the ultimate destination of said packages be located beyond the line of the Missouri, Kansas & Texas Railway Company, it hereby agrees to deliver same to its next connecting carrier, and it is understood and hereby agreed that the Missouri, Kansas & Texas Railway Company shall be held liable under this contract only for loss or damage occurring on its own lines, and while said packages were in its actual custody, and that the duty and liability of said Company as a common carrier shall absolutely cease and terminate upon delivery of said packages to its next connecting line.

It is understood, as a part of the conditions under which said packages are received, that neither this Railway Company nor other carrier shall be liable for leakage or fermenting of any kind of liquids, arising from expansion, bursting of packages, or other unavoidable causes or breaking of any kinds of glass carboys or acid, or articles packed in glass, stoves and stove furniture, castings, machinery, vehicles, furniture, musical instruments or eggs, the result of improper packing or loading, and the arrival at destination of such goods in a broken condition shall be prima facie evi-

dence that the said packages or said loading of same was insecure or improper, nor for loss or damage to any article whose bulk requires it to be carried in open cars, nor for decay of perishable articles, nor for loss or damage arising from the effect of heat or cold, nor for the wrong carriage or wrong delivery of goods that are improperly marked, nor for loss or damage by fire, nor for any loss or damage occasioned by riots, strikes, the acts of God or the public enemy.

In case of any loss or damage sustained by any of the property herein receipted for, whereby any liability or any responsibility may be incurred, the amount of loss or damage shall be computed at the value or cost of the article herein mentioned at the place and time of shipment, and the carrier so liable shall have the full benefit of any insurance that may have been effected upon or for account of said goods.

And it is further stipulated and mutually agreed that any claim which the shipper, consignor or consignee may have or prefer against the Missouri, Kansas & Texas Railway Company on account
15 of loss or damage occurring on the line of the Missouri, Kansas & Texas Railway shall be presented to some general officer or agent of said Company within thirty days after said loss or damage has been sustained.

This contract will be accomplished, and the liability of this Railway Company as a common carrier will be terminated, on the arrival of the articles covered by this bill of lading at the destination on the line of the *the* Missouri, Kansas & Texas Railway, or at the point of connection with any subsequent carrier, and this Railway Company, and all succeeding carriers, will be liable as warehousemen only after the arrival of such articles at their destination, and unless the same be unloaded and removed within the time limited by the car service rules and regulations in force at the place of destination, or if there be no such car service rules in force there, then within three days after arrival the Railway Company completing the transportation shall have the right to charge storage or demurrage, or at its option, to send such articles to some warehouse at the owner's expense and risk.

It is further stipulated and agreed that all articles consigned to switches or sidetracks having no agent are receipted for under this contract upon condition that all charges on the freight are prepaid as an accommodation to the consignee who hereby agrees that either the unloading of said freight or the switching of said car containing the same at such sidetrack, shall be, and constitute a complete delivery, and that the Missouri, Kansas & Texas Railway Company shall not be liable for any loss or damage whatsoever that may occur from any cause thereafter.

16 Goods in bond are subject to Custom house regulations and expenses; all packages are subject to necessary cooperage at owner's risk; all cotton is taken at carrier's option of compressing.

This bill of lading must be presented without alterations or erasures and surrendered, if demanded, upon the delivery of the property herein receipted for.

In the acceptance of this bill of lading the shipper, owner and

consignee of the goods agree to be bound by all its stipulations, exceptions and conditions, whether written or printed, as fully as if they were all signed by such shipper, owner or consignee.

In consideration of the foregoing stipulations and covenants the Missouri, Kansas & Texas Railway Company hereby guarantees the rate named as per margin, but it is expressly understood and agreed that the weights and classifications as set forth in the margin are subject to correction.

17 Marks, Consignee and Destination.	List of Articles.
S. O. Nfy. J. K. Davidson & Co. Galveston, Texas. For export Account Elevator A.	(1) car bulk wheat. 2361 K. I. 66000. F. A. Leland. 1042 Transit inspection June 13, 1900. Bureau.

Rates Guaranteed Through

To .....

If 1st Class.....Cents per 100 lbs.
" 2d " .....Cents per 100 lbs.
" 3d " 18½.....Cents per 100 lbs.
" 4th " .....Cents per 100 lbs.
" 5th " .....Cents per 100 lbs.
" Special.....per.....
Charges, $.....

18 A one cent revenue stamp was affixed thereto, duly cancelled by the Assistant General Freight Agent of the Missouri, Kansas & Texas Railway Company, at Kansas City, Missouri, and the following was endorsed upon the face of the contract:

"Original."

Not negotiable unless shipment be consigned to shipper's order."
The following was endorsed upon the back of said contract: "J. K. Davidson & Co."

EXHIBIT "B."

STATE OF MISSOURI,
Jackson County, ss:

Whereas, there was heretofore made, executed and entered into by and between Hutchins, Sealy & Company, plaintiff herein, and the Missouri, Kansas & Texas Railway Company, defendant herein, certain stipulation, substantially as follows:

19 "In the Circuit Court of Jackson County, Missouri, at Kansas City.

HUTCHINGS, SEALY & COMPANY, Plaintiffs,

vs.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Defendant.

Stipulation.

It is agreed between the parties plaintiffs and defendant as follows:

(1) The plaintiffs shall have the right to consent to the settlement outlined in the offer of W. A. Rule, Esq., Cashier of the National Bank of Commerce of Kansas City, Missouri, which offer is hereto attached, marked Exhibit "A".

(2) Said settlement between the plaintiffs and J. K. Davidson & Company shall in no way affect the rights of the parties hereto and shall be without any prejudice to any of the rights except that in case of a recovery by the plaintiffs herein defendant shall have credit for whatever amounts may have been paid by J. K. Davidson & Company to plaintiffs, and to an assignment of the unpaid notes executed by Davidson & Company to plaintiffs.

(3) This case shall be continued from term to term and shall not be pressed for trial by the plaintiffs unless J. K. Davidson
20 & Company shall make default in the payment of the notes described in the offer hereto attached, in which last named event the plaintiffs shall have the right to press said case to trial and final disposition.

(4) In the event that said notes are paid this case shall be dismissed at the costs of the plaintiffs."

And

Whereas, Exhibit "A" referred to in said stipulation and attached thereto and made a part of it is substantially as follows:

"W. A. Rule, Esq., Bank of Commerce, Kansas City, Mo.

DEAR SIR: The Galveston Wharf Company and Hutchings, Sealy & Company, if consent thereto be endorsed hereon by J. K. Davidson & Company, agree:

For their claim of $16,053.00 against Davidson & Company, to accept in cash 40 per cent or $6,421,20. This cash may be raised between you and the Fidelity Trust Company in any way you see fit, by taking or holding property now or heretofore owned by Davidson & Company or any member thereof, we waiving all right to object to the transfer of such property or to take advantage under the bankrupt law on account of any disposition made thereof, hereby assigning $6,421.20 of our claim against Davidson & Company to you and the Fidelity Trust Company.

21 J. K. Davidson is to execute four notes in equal amounts for the remaining 60 per cent due us, due in six, twelve, eighteen and twenty-four months respectively, after date, with interest at 6 per cent per annum upon each of said notes. Default in prompt payment of any one of the notes shall mature all of the notes. So long, as there is no default in any note, no proceedings in Court can be taken against Davidson and Davidson & Company, and this is all without prejudice to the claim held against the Missouri, Kansas & Texas Railway Company." And

Whereas, in pursuance thereof the said J. K. Davidson did execute and deliver to said Hutchings, Sealy & Company his four certain promissory notes, each dated October 6th, 1900, each for the sum of $2,407.95, and due respectively six, twelve, eighteen and twenty-four months after date, and

Whereas, the said J. K. Davidson & Company paid said two notes maturing six and twelve months respectively after said date. and

Whereas, the said J. K. Davidson has failed and defaulted in the payment of said note due eighteen months after its date, and has requested Hutchings, Sealy—Company to extend the time for the payment of said note for a period of six months from and after the due date thereof, and

Whereas, said case of Hutchings, Sealy & Company against the Missouri, Kansas & Texas Railway Company is still pending under said stipulation;

22 Now, therefore, the said Missouri, Kansas & Texas Railway Company hereby agrees and consents that said Hutchings, Sealy & Company may grant said extension to said J. K. Davidson and it is agreed by and between the parties plaintiffs and defendant in said suit that the foregoing stipulation be continued in force until said J. K. Davidson, shall make default in payment of

said notes as extended, in which last named event, the plaintiffs shall have the right to press said case to trial and final disposition.

June 5, 1902.

(Signed) MISSOURI, KANSAS & TEXAS RAILWAY COMPANY,
By JAMES HAGERMAN, *Its Attorney.*

EXHIBIT C.

In the Circuit Court of Jackson County, Missouri, at Kansas City.

HUTCHINGS, SEALY & COMPANY, Plaintiffs,

vs.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Defendant.

Stipulation.

It is hereby stipulated and agreed by and between the
23 parties to this suit that the Missouri, Kansas and Texas Railway Company, defendant, hereby consents that the notes of J. K. Davidson in favor of Hutchings, Sealy & Company, dated October 6th, 1900, and due eighteen (18) and twenty-four months respectively after said date, each for the sum of $2,407.95, mentioned and referred to in the stipulation hereto attached, dated June 5th, 1902, and hereby referred to and made a part hereof may be extended for six months from and after October 6th, 1902, and it is agreed by and between the said parties plaintiffs and defendant in said suit that the said stipulation hereto attached dated June 5th, 1902, and the former stipulation therein recited and referred to, shall be continued in force until the said J. K. Davidson shall make default in the payment of the said notes as extended, in which last named event the plaintiffs shall have the right to press said cause for trial and final disposition.

Witness the signatures of said parties this the 14th day of October, A. D. 1902.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY,
By JAMES HAGERMAN, *Its Attorney.*
HUTCHINGS, SEALY & CO.,
By KARNES, NEW & KRAUTHOFF,
Their Attorneys.

24 EXHIBIT D.

In the Circuit Court of Jackson County, Missouri, at Kansas City.

J. H. HUTCHINGS, GEORGE SEALY, JOHN SEALY, H. O. STEIN, and Sealy Hutchings, Partners Doing Business as Hutchings, Sealy & Company, Plaintiffs,

vs.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Defendant.

Plaintiffs say that now and at all times hereinafter complained of they were partners doing business under the style and firm name of Hutchings, Sealy & Company; that the defendant is and was a corporation duly organized and existing according to law.

Plaintiffs further say that heretofore, and on June 13th, 1900, plaintiffs purchased twenty-seven car-loads of wheat containing 29,100 bushels, which the defendant agreed to deliver to these plaintiffs; that the defendant has failed and refused to deliver said
25 wheat, as agreed; that the reasonable value thereof was twenty-five thousand dollars ($25,000) for which plaintiffs ask judgment and costs.

KARNES, NEW & KRAUTHOFF,
Attorneys for Plaintiffs.

Then followed in the same amended petition twenty-six (26) other causes of action in the same words as the above.

Thereafter the defendant filed in said District Court its amended answer herein, copy of which is as follows:

(Omitting Caption.)

Amended Answer.

I.

Comes now the above named defendant and for its amended answer to the amended petition of plaintiffs herein denies each and every material allegation, averment, matter and thing in said amended petition contained.

II.

For a second and further defense said defendant alleges
26 that before the commencement of this action plaintiffs assigned and transferred to one Fred M. Harris said alleged causes of action in the petition set forth and all their right, title and interest therein, and that said Fred M. Harris thereafter was and now is the real party at interest therein.

III.

Defendant for a third and further defense herein alleges that there is another action pending in the Circuit Court within and for Jackson County, Missouri, between Fred M. Harris, as the assignee of the plaintiffs herein, and the defendant herein for the same causes as that set forth in the amended petition herein and praying the same relief; that said Circuit Court of Jackson County, Missouri, is a Court of general jurisdiction having jurisdiction over the parties to the action and the subject-matter thereof and the power to grant the same relief as asked in this action.

IV.

For a fourth and further defense to the amended petition of plaintiffs, defendant alleges that if the facts contained in said amended petition are true, the same were discovered and actually known
27 by plaintiffs on or before the 20th day of June, 1900; that this action was commenced on or about the 29th day of March, 1905, and not within two years from the time when plaintiff had actual knowledge of the alleged facts upon which his alleged cause of action depends, and this action is, therefore, barred by the statute of limitations.

V.

For a fifth and further defense herein defendant alleges that it was not guilty of the grievances alleged in the complaint at any time within three years before the commencement of this action.

VI.

For a sixth and further defense herein defendant denies that it ever made, executed or delivered or caused or authorized to be made, executed or delivered the bill or bills of lading attached to plaintiff's amended petition as "Exhibit A," and defendant further denies that said bills of lading were executed, made or delivered by said F. A. Leland.

VII.

For a seventh and further defense defendant alleges that
28 said plaintiffs on June 30, 1900, in the Circuit Court of Jackson County, Missouri, began an action wherein they were plaintiffs and Missouri, Kansas & Texas Railway Company was defendant; that said plaintiffs in said action filed a petition, a copy of which is in words and figures as follows, towit:

"In the Circuit Court of Jackson County, Missouri.

J. H. HUTCHINGS, GEORGE SEALY, JOHN SEALY, H. O. STEIN, and Sealy Hutchings, Partners Doing Business as Hutchings, Sealy & Company, Plaintiffs,

v.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Defendant.

Plaintiffs say that now and at all times hereinafter complained of they were partners doing business under the style and firm name of Hutchings, Sealy & Company, that the defendant is and was a corporation duly organized and existing according to law.

Plaintiffs further say that heretofore, and on June 13th, 1900, plaintiffs purchased twenty-seven carloads of wheat containing 29,100 bushels, which the defendant agreed to deliver to these plaintiffs; that the defendant has failed and refused to deliver said wheat as agreed; that the reasonable value thereof was twenty-five thousand dollars (25,000) for which plaintiffs ask judgment and costs.

KARNES, NEW & KRAUTHOFF,
Attorneys for Plaintiff."

29 That thereafter said defendant filed its petition for removal to the United States Circuit Court and its bond in proper form and said case was removed to the Circuit Court of the United States; that while said case was pending in the United States Circuit Court said plaintiffs entered into a stipulation and compromise of matters in controversy between them and J. K. Davidson & Company, whereby they agreed to accept in full settlement thereof forty (40) per cent of their claim against said J. K. Davidson & Co. in cash and for the remaining sixty (60) per cent of their said claim against said J. K. Davidson & Co., they agreed to receive the notes of said J. K. Davidson & Co.; that copy of said stipulation and agreement and compromise is hereto attached as "Exhibit A" and made a part hereof; that during the pendency of these matters and while said plaintiffs were negotiating with said J. K. Davidson & Co., at their request said action, pending in the Circuit Court of the United States, was continued from term to term, but that said defendant had no connection with the compromise made by said plaintiffs with said Davidson & Co., nor did it in any way become obligated to see that said compromise was carried out, nor did it thereby or in any other way acknowledge liability to the said plaintiffs on the said cause of action; and the said case was continued from term to term simply and solely for the accommodation of the plain-
30 tiffs and at their request; that said plaintiffs dismissed said action on the — day of ——, 190–.

VIII.

For an eight- and further defense defendant makes the seventh defense herein a part of this as fully as though herein repeated and

further says that said J. K. Davidson & Co. performed the terms and conditions of said settlement and compromise and paid in cash to said plaintiffs the sum of forty (40) per cent of their said claims against the said J. K. Davidson & Co. and in further compliance with the terms of said contract delivered to them the notes of said J. K. Davidson & Co., which were received by the said plaintiffs in full performance of the terms and conditions of said agreement and settlement; that said plaintiffs, since receiving the notes as above alleged, have retained possession of said notes.

IX.

For a ninth and further defense herein defendant alleges that the contracts, set out in plaintiffs' amended petition herein as "Exhibit A," being receipts or bills of lading, were issued by some clerk who was without authority whatsoever to execute and deliver the
31 same, no wheat having been actually delivered to the company at the time of the execution of said receipts or bills of lading or thereafter, and that the same were executed by said clerk in violation of the laws of the State of Missouri; that said receipts or bills of lading, alleged in the amended petition herein, were made without this state and within the State of Missouri, and was a Missouri transaction, and the rights and duties of the parties are governed by the laws of the State of Missouri; that by Chapter 79, Sections 5048, 5049, 5050, 5051, 5052, 5053, 5054, 5055, 5056, and 5057, Revised Statutes of Missouri, 1899, it is provided as follows.

"Sec. 5048. Warehouseman, etc., not to issue receipt until goods are actually in store.—No warehouse man, wharfinger, or other person, shall issue any receipt or other voucher for any goods, wares, merchandise, grain, flour, or other produce or commodity, to any person or persons purporting to be the holder, owner or owners thereof, unless such goods, wares, merchandise, grain, or other produce or commodity, shall have been actually received into store or upon the premises of such warehouseman, wharfinger, or other person, and shall be in the store or on the premises aforesaid and under his control at the time of issuing such receipts. (R. S. 1889, Paragraph 739—*g*.)

Sec. 5049. Not to issue any receipt for money loaned, etc., until goods actually in store.—No warehouseman, wharfinger, or other person, shall issue any receipt or other voucher upon any goods,
32 wares, merchandise, grain, flour, or other produce or commodity, to any person or persons, for any money loaned, or other indebtedness, unless such goods, wares, merchandise, grain flour or other produce or commodity, shall be, at the time of issuing such receipt, in the custody of such warehousemen, wharfinger, or other person, and shall be in store or upon the premises and under his control at the time of issuing such receipt or other voucher, as aforesaid. (R. S. 1889, Paragraph 740.)

Sec. 5050. Not to issue second receipt, when.—No warehouseman, wharfinger, or other person, shall issue any second or duplicate receipt for any goods, wares, merchandise, grain, flour, or other produce

or commodity, while any former receipt for any such goods, wares, merchandise, grain, flour, or other produce or commodity, as aforesaid, or any part thereof, shall be outstanding and uncancelled, without writing across the face of the same duplicate. (R. S. 1889, Paragraph 741—*h*.)

Sec. 5051. Not to sell, etc., goods without written assent of person holding receipt.—No warehouseman, wharfinger, or other person, shall sell or incumber, ship, transfer, or in any manner remove, or permit to be shipped, transferred or removed beyond his control, any goods, wares, merchandise, grain, flour, or other produce or commodity, for which a receipt shall have been given by him, as aforesaid, whether received for storing, shipping, grinding, manufacturing, or other purpose, without the written assent of the person or persons holding such receipt. (R. S. 1889, Paragraph 742—*i*.)

Sec. 5052. Not to give shipping receipt until goods are
33 actually on boat, etc.—No master, owner or agent of any boat or vessel of any description, forwarder, or officer or agent of any railroad, transfer or transportation company, or other person, shall sign or give any bill of ladin-, receipt or other voucher or document for any merchandise or property, by which it shall appear that such merchandise or property has been shipped on board of any boat, vessel, railroad car or other vehicle, unless the same shall have been actually shipped and put on board, and shall be at the time actually on board or delivered to such boat, vessel, car or other vehicle, to be carried and conveyed as expressed in such bill of lading, receipt or other voucher or document. (R. S. 1889, Paragraph 743—*j*.)

Sec. 5053. Receipts, bills of lading, etc., declared negotiable.—All receipts issued or given by any warehouseman, or other person or firm, and all bills of lading, transportation receipts and contracts of affreightment, issued or given by any person, boat, railroad or transportation or transfer company, for goods, wares, merchandise, grain, flour, or other produce, shall be and are hereby made negotiable by written indorsement thereon, and delivery in the same manner as bills of exchange and promissory notes; and no printed or written conditions, clauses or provisions inserted or attached to any such receipts, bills of lading or contracts, shall in any way limit the negotiability or affect any negotiation thereof, nor in any manner impair the right and duties of the parties thereto, or persons interested therein; and every such condition, clauses or provision purporting to limit or affect the rights, duties or liabilities created or declared in this chapter, shall be void and of no force or effect. (R. S. 1889, Paragraph 744-*k*.)

34 Sec. 5054. How transferred—lien created—exception.—Warehouse receipts given by any warehouseman, wharfinger or other person or firm, for any good-, wares, merchandise, grain, flour or other produce or commodity, stored or deposited, and all bills of lading and transportation receipts of every kind, given by any carrier, boat, vessel, railroad, transportation or transfer company, may be transferred by indorsement in writing thereon, and the delivery thereof so indorsed; and any and all persons to whom the same

may be so transferred shall be deemed and held to be the owner of such goods, wares, merchandise, grain, flour or other produce or commodity, so far as to give validity to any pledge, lien or transfer given, made or created thereby, as on the faith thereof, and no property so stored or deposited, as specified in such bills of lading or receipts, shall be delivered, except on surrender and cancellation of such receipts and bills of lading; Provided, however, that all such receipts and bills of lading, which shall have the words not negotiable plainly written or stamped on the face thereof, shall be exempt from the provisions of this act. (R. S. 1889, Paragraph 745-*l*.)

Sec. 5055. Penalty for violation of the provisions of this chapter.—Any warehouseman, wharfinger, forwarder or other person who shall violate any of the provisions of this chapter shall be deemed guilty of a criminal offense, and, upon indictment and conviction, shall be fined in any sum not exceeding five thousand dollars, or imprisoned in the penitentiary of this state nor exceeding five years, or both; and all and every person or persons aggrieved by the violation of any of the provisions of this chapter may have and maintain an action at law against the person or persons, corporation or corporations, violating any of the provisions of this chapter, to re-
35 cover all damages, immediate or consequential, which he or they may have sustained by reason of any such violation, as aforesaid, before any Court of competent jurisdiction, whether such person or persons shall have been convicted of fraud, as aforesaid, under this chapter, or not. (R. S. 1889, Paragraph 764-*m*.)

Sec. 5056. This chapter applicable to bills of lading.—All the provisions of this chapter shall apply and be applicable to bills of lading, and to all persons or corporations, their agents or servants, that shall or may issue bills of lading of any kind or description, the same as if the words forwarder and bills of lading were mentioned in every section of said chapter. (R. S. 1889, Paragraph 747-*n*.)

Sec. 5057. Exception as to application.—So much of the preceding sections of this chapter as forbids the delivery of property except upon surrender and cancellation of the original receipt or bill of lading, or the indorsement of such delivery thereon in case of partial delivery, shall not apply to property replevied or removed by operation of law. (R. S. 1889, Paragraph 748-*o*.)"

The aforesaid statutes have been ever since their passage and now are in full force and effect in said State of Missouri, and define the rights and duties of the parties relative to the matters complained of in plaintiffs' amended petition herein; that when said receipts or bills of lading, attached as "Exhibit A" to plaintiffs' amended petition, were signed, said wheat, mentioned and described therein, had not been actually delivered to said defendant, nor actually
36 shipped or put on board in car or other vehicle, to be carried and conveyed, as expressed in said bills of lading or receipts; that the highest Court of ultimate and appellate jurisdiction in the State of Missouri, in proper cases brought before it for review, to-wit: Louisiana National Bank of New Orleans, Appellant, v. Theodore Laveille, et al., Respondents, reported in 52 Missouri Reports 380, and in the case of Aetna National Bank, Respondent, v. Water

Power Company, et al., Appellants, reported in 58 Missouri Appeals 532, has decided and still holds that under the above quoted statutes all bills of lading or receipts issued by an agent of a railroad company, when the property therein described has not been delivered to said railroad company for shipment and is not under the control of said railroad company at the time of the issuance of said receipts or bills of lading, such bills of lading or receipts are absolutely void, and convey no title by the delivery of such bills of lading, nor do the recitations therein contained estop the railroad company from denying the truth, nor can an assignee of such bill of lading recover by virtue of the issuance and delivery of such bills of lading either by way of estoppel or in any other way, against said railroad company whose agent issued the same.

37 X.

For a tenth and further defense herein defendant makes allegations of ninth defense a part of this defense as though here set out and alleges that by Section 4271, Revised Statutes of Missouri, 1899, it is provided:

"Sec. 4271. Period of limitation prescribed.—Civil actions, other than those for the recovery of seal property, can only be commenced within the periods prescribed in the following sections, after the causes of action shall have accrued. (R. S. 1889, Paragraph 6773-*b*.)"

Section 4274 of the Revised Statutes of Missouri, 1899, provides:

"Sec. 4274. What within three years.—Within three years: First, an action against a sheriff, coroner or other officer, upon a liability incurred by the doing of an act in his official capacity and in virtue of his office, or by the omission of an official duty, including the nonpayment of money collected upon an execution or otherwise; second, an action upon a statute for a penalty or forfeiture, where the action is given to the party aggrieved, or to such party and the state. (R. S. 1889, Paragraph 6776-*c*.)"

38 That the aforesaid has been ever since its passage and now is in full force and effect in the State of Missouri; that said alleged causes of action set out in plaintiffs' amended petition herein were barred by virtue of the foregoing statutes prior to the time this action was commenced; that, if true, the matters and things alleged and complained of by said plaintiffs in this action and the whole transaction took place within the State of Missouri, and the causes of action alleged did not accrue within three years prior to the commencement of this action; that because of the foregoing facts the alleged causes of action set forth in plaintiffs' amended petition herein are barred under Section 4450, General Statutes of Kansas, 1901.

XI.

For an eleventh and further defense defendant alleges that neither said plaintiffs, nor any one for them, presented to some general

officer or agent of the company, within thirty days of their alleged loss and damage, a notice of any claim which they had or preferred against the defendant, nor have they at any time prior to the commencement of this action notified defendant of any claim for damages against the defendant.

39 Wherefore defendant prays that this action be dismissed at the cost of the plaintiffs.

JOHN MADDEN,
W. W. BROWN,
Attorneys for Defendant.

STATE OF KANSAS,
Labette County, ss:

W. W. Brown, of lawful age, being first duly sworn on oath deposes and says, that he is attorney for the defendant in the above entitled action; that he has read the sixth and ninth paragraphs of the foregoing amended answer which constitute the sixth and ninth defenses thereof, and that he believes the statements contained in said sixth and ninth paragraphs to be true.

W. W. BROWN.

Subscribed and sworn to before me by W. W. Brown this 9th day of January, 1907.

[SEAL.] W. R. GLASS,
Notary Public.

My commission expires November 25, 1908."

40 EXHIBIT A.

In the Circuit Court of Jackson County, Missouri, at Kansas City.

HUTCHINGS, SEALY AND COMPANY, Plaintiffs,
v.
MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Defendant.

Stipulation.

It is agreed between the parties plaintiffs and defendant, as follows:

(1) The plaintiffs shall have the right to consent to the settlement outlined in the offer to W. A. Rule, Esq., cashier of the National Bank of Commerce of Kansas City, Missouri, which offer is hereto attached, marked Exhibit "A."

(2) Said settlement between the plaintiffs and J. K. Davidson & Company shall in no way affect the rights of the parties hereto, and shall be without any prejudice to any of said rights, except that in case of recovery by the plaintiffs herein defendant shall have credit for whatever amounts may have been paid by J. K. Davidson

41 & Company to plaintiffs and to an assignment of the unpaid notes executed by Davidson & Company to plaintiffs.

(3) This case shall be continued from term to term, and shall not be pressed for trial by the plaintiffs unless J. K. Davidson & Company shall make default in the payment of the notes described in the offer hereto attached, in which last named event the plaintiff shall have the right to press said case to trial and final disposition.

(4) In the event that said notes are paid this case shall be dismissed at the costs of the plaintiffs.

KARNES, NEW & KRAUTHOFF,
Attorneys for Plaintiffs.
JAMES HAGERMAN,
Attorneys for Defendant.

EXHIBIT A.

W. A. Rule, Esq., Cashier National Bank of Commerce, Kansas City, Mo.

DEAR SIR: The Galveston Wharf Company and Hutchings, Sealy & Company, if consent thereto be endorsed hereon by J. K. Davidson & Company, agree:

42 For their claim of $16,053.00 against Davidson & Company, to accept in cash 40 per cent, or $6,421.20. This cash may be raised between you and the Fidelity Trust Company in any way you see fit, by taking or holding property now or heretofore owned by Davidson & Company or any member thereof, we waiving all right to object to the transfer of such property or to take any advantage under the bankrupt law on account of any disposition made thereof, hereby assigning $6,421.20 of our claim against Davidson & Company to you and the Fidelity Trust Company.

J. K. Davidson is to execute four notes in equal amounts for the remaining 60 per cent due us, due in six, twelve, eighteen and twenty-four months respectively after date, with interest at 6 per cent per annum upon each note. Default in prompt payment of any one of the notes shall mature all of the notes. So long as there is no default in any note, no proceedings in court shall be taken against Davidson and Davidson & Company, and this is all without prejudice to the claim held against the Missouri, Kansas & Texas Railway Company.

GALVESTON WHARF COMPANY,
HUTCHINGS, SEALY & COMPANY,
By —— ——, *Its Attorneys.*

Dated September —, 1900.

Thereafter the plaintiffs filed their reply to the amended answer of the defendant as follows:

43 *Reply.*

The plaintiffs for their reply to the amended answer of the defendant:

First. Deny the said answer and each and every allegation therein contained not hereinafter specifically admitted.

Second. These plaintiffs admit that the sections of the Missouri statutes set out in the ninth and tenth paragraphs of the amended answer herein are correct copies of such statutes, but they specifically deny the following statements in such ninth paragraph:

* * * that the highest court of ultimate and appellate jurisdiction in the state of Missouri in proper cases brought before it for review, to-wit: Louisiana National Bank of New Orleans, Appellant, vs. Theodore Laveille, Respondent, reported in 52 Missouri Reports 380 and in the case of Ætna National Bank, Respondent, vs. Water Power Company, et al., Appellants, reported in 58 Missouri Appeals 532, has decided, and still holds, that under the above quoted
44 statutes all bills of lading or receipts issued by the agent of a railroad company when the property therein described has not been delivered to the said railroad company for shipment and is not under the control of said railroad company at the time of the issuance of said receipts or bills of lading, such bills of lading or receipts are absolutely void and convey no title by the delivery of such bills of lading nor do the recitations therein contained estop the railroad company from denying the truth, nor can an assignee of such bill of lading recover by virtue of the issuance or delivery of such bills of lading either by way of estoppel or in any other way against said railroad company whose agent issued the same."

These plaintiffs deny that the courts of the state of Missouri in the two cases mentioned, or in any other cases, decided and still decide that bills of lading issued without the receipt of the goods mentioned therein are absolutely void, and these plaintiffs further allege that the Court of Appeals of the state of Missouri, one of the superior courts of that state, in a case brought before it, decided that where a carrier issues a bill of lading it is valid in the hands of an innocent purchaser though the goods were not in fact received by the carrier, and he is estopped to deny the non-receipt, and that where the general agent of the corporation, who is in fact the corporation,
45 issues such a bill, the corporation is estopped to deny the truth of the statements in the bill, and these plaintiffs allege that such decision last mentioned states the law in the state of Missouri. Such decision is that of Smith vs. The Missouri Pacific Railway Company, reported in 74 Missouri Appeals 48. A full complete copy of the opinion in such case is attached hereto and made a part of this reply, marked "A." It will be seen from the reading of this opinion, that this proceeding was certified to the Supreme court of the state of Missouri. It was, however, dismissed in that court, and the opinion thus rendered by the Court of Appeals stands as the law of the state of Missouri upon the questions discussed.

A copy of the opinion of the courts of the state of Missouri in the

cases of Louisiana National Bank of New Orleans, Respondent, vs. Theodore Lavielle, Appellant, 52 Missouri Reprots 380, referred to in the amended answer, and The Ætna National Bank vs. Water Power Company, 58 Missouri Appeals 532, also referre- to in the amended answer, are attached hereto and made a part of this reply marked "B" and "C" respectively. These copies are thus set out and attached to this reply that this court may see that the courts of final and ultimate jurisdiction of the state of Missouri have not decided as is stated in the amended answer.

46 Third. These plaintiffs allege that on the 20th day of June, 1900, after they had received the bills of lading and had advanced thereon the various sums of money as mentioned in the petition herein, they received a telegram for Mr. F. A. Leland, who was then the Assistant General Freight Agent of the defendant company, and who was the duly authorized and acting agent of the defendant company. Such telegram is as follows:

Hutchings, Sealy Co., Galveston, Texas:

Bills of lading on following cars June thirteenth, fourteenth, fifteenth, and sixteenth covering wheat from J. K. Davidson and Co., Galveston, Texas, were fraudulently and improperly obtained and this company will not honor same. Cars eleven thousand and ninety six, eleven four hundred and eight, ten two hundred ten, ten thousand seventy eight, twenty five eighty eight, twenty three sixty one, eleven five forty eight, twenty five fifty six, eleven six hundred, eleven thousand and thirty nine, twenty six ninety two, twelve thousand and thirty eight, eleven six nin-teen, twenty one sixty eight, twenty nineteen, ten nine sixty six, ten three thirty six, eleven seven ninety three, twenty six twenty six, eleven thirty five, eleven eight forty one, two thousand two, twenty seven naught one, eleven two forty one, eleven four seventy, all M. K. & T.

F. A. LELAND,
A. G. F., A. M. K. & T. Ry.

47 That plaintiff, upon the receipt of such message from the defendant company, immediately notified the defendant compnay as follows by telegram:

GALVESTON, TEXAS, June 21, 1900.

F. A. Leland, A. G. F., A. M. K. & T. Ry., Kansas City, Mo.:

Telegram just received. We hold all bills lading mentioned duly signed and transferred having acquired same for value without notice. We demand prompt delivery of cars covered thereby and will hold your company responsible for any delay or failure of delivery. Please advise what were fraudulent and improper circumstances under which you claim bills lading were issued. Answer quick our expense.

HUTCHINGS, SEALY & CO.

Upon receipt of the above message from the plaintiffs the defendant company by one C. Haile, its duly authorized and acting agent,

and who was at that time the Traffic Manager of the defendant company, sent to these plaintiffs the following telegram, dated the 21st day of June, 1900, and sent from St. Louis, Missouri:

48 Hutchings, Sealy and Co., Galveston, Texas:

Answering your message of today addressed to F. A. Leland, our assistant general freight agent at Kansas City in reply to his message of yesterday which was sent you under my direction I would say that the bills of lading referred to were procured on the representation in writing of the Union Elevator Company and J. K. Davidson and Company that the wheat had been loaded in our cars which representations were not true.

C. HAILE.

Immediately after the receipt of the above message these plaintiffs on June 21st, 1900, duly sent to the defendant company the following message:

C. Haile, Traffic Manager M. K. & T. Ry. Co., St. Louis, Mo.:

Answering telegram. Bills lading were regularly issued and delivered by your company for grain covered thereby and we negotiated same in reliance upon terms bills lading and without notice. We know nothing about representations to your agent by Davidson nor Union Elevator. If wheat not delivered to us promptly will hold company responsible for today's market value of grain owned by us and covered by bills lading in our hands and enforce same by suit here.

HUTCHINGS, SEALY & CO.

49 And on said 21st day of June, 1900, the defendant company further sent to these plaintiffs two other messages by telegraph, copies of which messages are as follows:

Hutchings, Sealy & Company, Galveston, Texas:

Your wire even date. As stated in my wire this morning these bills of lading were fraudulently secured on false representations and our agent signing same was wholly unauthorized to do so because no grain was delivered to the railroad company.

C. HAILE.

Said other telegram was as follows:

Hutchings, Sealy and Company, Galveston, Texas:

Accept this as notice that conditions as mentioned in my wire of twentieth will also cover cars eleven five twenty and eleven seven forty eight.

F. A. LELAND.

These plaintiffs allege that the defendant by the sending of such messages waived the necessity of notice of any claim which these

plaintiffs had or preferred against the defendant as stated in the eleventh paragraph of the amended answer herein, and that
50 by the sending of the messages to the defendant the plaintiffs fully complied with all provisions of the bill of lading on its part to be performed.

Wherefore, these plaintiffs again pray judgment as asked in the petition.

KARNES, NEW & KRAUTHOFF,
F. M. HARRIS,
Attorneys for Plaintiffs.

STATE OF KANSAS,
Franklin County, ss:

F. M. Harris, being on oath duly sworn, says that he is one of the plaintiffs' attorneys, that he has read the foregoing reply, knows the contents thereof, and the same is true.

F. M. HARRIS.

Subscribed and sworn to before me this — day of April, 1909.
DELIA E. BRODERICK,
Notary Public.

My commission expires Sept. 17, 1911.

51 EXHIBIT "A."

G. W. SMITH, Respondent,

vs.

MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, January 14, 1895.

Bills and Notes: bills of lading: principal and agent: carriers. Regarding the validity of bills of lading issued by agents of common carriers in the hands of innocent third parties where the goods in fact are not delivered to the carrier, two doctrines prevail: (1) That the carrier is not liable since the receipt of the goods alone confers the power on the agent to issue the bill. (2) That the carrier is liable for such bills since the knowledge of whether the goods had been received and the power in fact conferred lies peculiarly with the agent.

Estoppel: corporation. Where the carrier himself issues such bill of lading it is valid in the hands of innocent third parties though the goods were not in fact received by the carrier and he is estopped to deny the non-receipt; and where the general agent of a corporation, who is in fact the corporation, issues such bill, the corporation is estopped.

52 Subsequent Receipt of Goods: judgment in replevin. The fact that the goods were subsequently delivered to the carrier for other parties who recovered them by a judgment in replevin, will

not defeat an action for damages against the corporation for issuing a bill to plaintiff's endorser before the receipt of the goods.

Appeal from Jackson Circuit Court, Hon. J. H. Slover, Judge.

ELLISON, *J.*:

The present action is for damages in which the plaintiff had judgment below.

It appears from the evidence that defendant's agents at Kansas City on two occasions issued to one Nathan at Kansas City a bill of lading for a car load of grain whereby it was stated in each that defendant had received said grain to be transported "to Memphis, Tennessee, and delivered to the consignee, or a connecting common carrier." In neither instance at the issuance of the bill of lading was the grain actually shipped and on board the cars of defendant, as it is provided it shall be by sections 743 and 746 Revised Statutes 1889. It was shown in evidence that plaintiff purchased the bill of lading of Nathan for a valuable consideration. That the grain aforesaid was never shipped by defendant but was the property of other parties than Nathan or defendant, to-wit: the property of Hall and Robinson, to whom defendant had theretofore issued bills of lading, who appropriated the same to their own use.

Plaintiff's action is based on the sections of the statute
53 aforesaid, he claiming damages thereunder for the injury done him by the alleged wrongful act of defendants in issuing the bill of lading without having the grain shipped aboard the cars. There was evidence tending to show that plaintiff purchased the bill in reliance upon its face.

There is much authority, and that too from high sources, holding that a general agent has no authority to bind a carrier for the transportation of goods—no authority to issue a bill of lading unless the goods have been actually received for transportation. And in such case that though the bill of lading be in the hands of an innocent purchaser for value he cannot hold the carrier. 2 Daniel Neg. Inst. Sec. 1733; Pollard vs. Vinton, 105 U. S. 7; Schooner Freeman vs. Buckingham, 18 How. 190. It has been so held in a case in this state directly involving this question. Bank vs. Lavielle, 52 Mo. 380. It is likewise the rule in the great commercial country of England. Grant vs. Norway, 10 C. B. 665; Hubbersty vs. Ward, 18 Eng. Law and Eq. 551; Coleman vs. Richardson, 29 Id. 323; Cox vs. Bruce, 18 Q. B. 147. In Pollard vs. Vinton, supra, Judge Miller says, "The receipt of the goods lies at the foundation of the contract to carry and deliver." * * * "Before the power to make and deliver a bill of lading could arise, some person must have shipped goods on the vessel." * * * "They (the agents) had no power to sell bills of lading. They had no power to execute these instruments and go out and sell them to purchasers."

The foregoing cases relate to masters of vessels; but it has been held to apply, with even more force, to bills issued by freight agents

for railroad companies—such agents having, generally, less
54 power than the masters of vessels. Ry. vs. Wilkins, 44 Md. 23, 26; Ry. vs. Knight, 122 U. S. 87.

The ground upon which these decisions rest is not only that the masters of vessels and freight agents of railway companies have no authority to bind their principals but that the commercial public well know that their authority to issue a bill of lading depends upon the precedent fact of the receipt of the freight. If this be true, it affords ground for formidable objection against the ground of estoppel asserted against the principal in those cases which refuse to follow the cases we have cited. It must be conceded to be one of the fundamental principles of agency that when one knows an agent's authority to be limited as it relates to a certain act, that person must ascertain for himself whether the limitation has been transgressed. Thus, suppose one knows that a general agent with whom he was about to deal has no right to represent his principal, in the particular transaction, unless he be authorized in writing. Would not such person be bound to ascertain whether such authority existed? And he could not be permitted to rely upon the agent's statement that such written authority had been given. So, if it be known to the business public that a railway freight agent or the master of a vessel has no authority to issue a bill of lading for freight not received, or, in other words, has no authority except for freight actually received, it would seem to be logically clear that persons thus having such knowledge must ascertain the fact, or deal with such an agent at their hazard.

(2) Notwithstanding the high character of the courts, including as before stated, our own Supreme court, which have so de-
55 cided the question, there are a number of adjudications to the contrary. These cases do not expressly disapprove of the reasoning found in the cases which we have cited, but the jurists who have taken the opposing view find a theory upon which to base their conclusions, which, when stated in its full breadth, is that in this day in the light of commercial usage, railway companies must be held to know, what is known to all business men, that bills of lading have now become one of the common means of commercial exchange and upon which advances are made to shippers or their assigns, that the money thus advanced to the shipper is by him frequently used, especially in grain and live stock, to pay the producer. That such bills of lading for most all classes of freight are commonly used in commercial exchange for the convenience and security of modern commerce. With this knowledge of the use made of such bills, which has grown with the general growth of commerce, a railway company employs agents for the purpose of receiving freight for shipment but it also employs him for the further purpose of stating, in the form of a bill of lading, the receipt of such freight. He being therefore placed in a position by the railway company to enable him to make a statement which is put in a form for the purpose of reaching, and whereby it may reach, innocent parties. A statement, too, which lies wholly and peculiarly within his knowledge; it would seem that persons in commercial business ought to safely rely upon

a statement thus made and that if they do so rely upon it and alter their position upon account thereof, the railway company should not be permitted to deny the receipts of the freight as stated in the bill. These views are supported by the following, among other authorities: Bank vs. Ry., 106 N. Y. 195; Armour vs. Ry., N. Y. 111; Griswold vs. Haven, 25 N. Y. 595; Brooke vs. Ry., 108 P. St., 529; Bank vs. Ry., 20 Kan., 519; Ry. vs. —— ——, 10 Neb. 556; Ry. vs.
56 Larned, 103 Ill. 293. In the first of these cases the supreme court of New York regarded it as the settled "law of agency that where the principal has clothed his agent with power to do an act upon the existence of some extrinsic fact necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, a third person dealing with such agent in entire good faith pursuant to the apparent power, may rely upon the representation, and the principal is estopped from denying the truth to his prejudice." This is upon the doctrine of estoppel in pais.

In cases like the one in hand the agent has the power to issue a bill of lading when the goods are actually received for shipment. The extrinsic fact of the receipt of goods by him is the authority upon which his power depends. The knowledge whether the goods have been received by him and thus the power conferred lies peculiarly with him. His representation as to the existence of this important fact ought to bind the principal for the simple reason, if nothing more, that the principal has placed him in his agency for the purpose of making a representation as to this fact. The principal knows too, that bills of lading fall into the hands of innocent parties in the course of daily commercial transactions at a great distance from the place of shipment who, while knowing that they should only be issued on receipt of the goods, yet must necessarily depend upon the statement of the agent therein, who has knowledge of the fact as to such receipt. The principal may be innocent. The purchaser of the bill of lading relying upon its statement of the receipt of the goods certainly is. So, therefore, "Whenever one of
57 two innocent parties must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it."

We, however, deem it proper to say that if the necessities of this case required us to adopt either of the foregoing views we should feel compelled to follow (though we concede, unwillingly) the view set forth in the first division of this opinion, for the reason that is is supported by the only enunciation we have from our supreme court on that question.

In Bank vs. Laveille, 52 Mo. 380, referred to above attention was not directed to the view of the case which we have last discussed. Nor was our statute, section 744, 745, regarding the negotiability of such bill referred to. We need not here undertake to construe those sections, neither need we say what attributes, if any, which belong to bills of exchange and promissory notes as commercial paper, attach by reason of this statute to a bill of lading. We have entered upon an examination of the two antagonistic holdings on this important

question in order that we might ascertain the reasons upon which they are respectively based, to the end that we might arrive at a satisfactory disposition of the case at bar under the facts surrounding it, especially as those facts relate to the corporation defendant.

The true law of agency may be either of the theories developed and stated herein, but as to a further branch of the question which is disassociated from agency, and which we think controls this case there is no difference of opinion. That is, where the carrier himself issues the bill of lading, he will not be permitted to say to the
58 prejudice of an innocent holder that he never received the freight. To permit him to do this would be to violate every principle of estoppel and would be offering a premium for wrongdoing. Thus if the master of a vessel, being also the owner, issue a bill of lading without having the goods on board he is estopped to deny the receipt which he has stated in the bill. This principle was recognized more or less directly in Bank vs. Laveille, 52 Mo. 380; Freeman vs. Buckingham, 80 How. 188; Ellis vs. Willard, 5 Seld. 529; The Delaware, 14 Wall. 601; The Lady Franklin, 8 Wall. 325; Relyea vs. R. R., 42 Conn. 579; Dickerson vs. Seelye, 12 Barb. 99.

Now we consider the act of defendant's general agent here as the act of the defendant corporation itself. A corporation has agents; indeed, from its composition, can only act through agents. These agents are frequently such in the ordinary acceptance of the work; they are also frequently ex necessitate rei, the corporation itself., McGinnis vs. Ry., 21 Mo. App. 408. Mr. Street was the general commercial agent of defendant, in charge of a vast amount of territory over which and from which, the defendant drew freight. He was in charge and had supervisory control of the defendant's business in this re-pect. He was pro hac vice, the defendant itself. Such we believe was the opinion of the supreme court of the United States as expressed in Pollard vs. Vinton, 105 U. S. 7, though that case did not involve this point. This view is in keeping with the evident intent and object of the statute which contemplates that such irregular bills of lading may be issued by corporations through their agents and its object is to give a remedy to him who may be injured thereby.

59 We have not considered as of any force the point made by the defendant that the grain was in fact afterward delivered to it, but was then taken from it by a judgment in replevin, of all of which plaintiff had notice, from the fact that when defendant did afterward receive the grain it did not receive it from or for Nathan or this plaintiff. It received it from and for the plaintiffs in the replevin suit and had theretofore issued to those plaintiffs bills of lading therefor. If the grain was taken from defendant by process of law it was on account of the wrongful act or double dealing (though perhaps inadvertant) of its own freight agents.

The result is that we affirm the judgment. Gill, J., concurs. Smith, P. J., not sitting.

GILL, J. (concurring):

While concurring in the foregoing opinion of Judge Ellison, I yet feel doubtful as to whether the conclusion reached can be harmonized with Bank vs. Laveille, 52 Mo. 380. In order, then, that a question so important to our commercial interests may be settled in this state, I have concluded to ask that the case be certified to the supreme court.

60 EXHIBIT "B."

LOUISIANA NATIONAL BANK OF NEW ORLEANS, Appellant,

vs.

THEODORE LAVEILLE et al., Respondents.

Common Carriers.—Liability; bills of lading; goods not received; third parties.—The owners of a boat are not rendered liable at the suit of a third party in consequence of a bill of lading having been issued for goods as shipped on board that boat by one apparently having authority therefor, to the consignor named in said bill of lading, who negotiated a bill of exchange drawn on the consignee to such third party, who purchases and has indorsed to him for value the bill of exchange on the faith and on the security of the bill of lading which is also transferred to him, without knowledge or notice of lack of authority on the part of him who signed the bill of lading, or that the goods recited in the bill were never shipped.

Appeal from St. Louis Circuit Court. Judge Sherwood delivered the opinion of the court.

Action in the St. Louis Circuit Court, brought by the Louisiana National Bank against Theodore Laveille and others.

The petition in substance states that defendants were the
61 owners of the steamboat Mississippi, and common carriers, engaged as such in carrying on said boat, property, merchandise, &c., between the port of New Orleans and that of St. Louis; that the defendant had their officers, agents, and employees, engaged in their said business at New Orleans, &c.; that on the 8th day of February, 1870, at the said last mentioned port, and while said boat was at the same, defendants by their authorized agents executed and delivered to A. C. Wilbur & Co. a certain bill of lading of that date, in which was acknowledged the shipment by said Wilbur & Co., on said boat of eighty-nine drums of caustic soda in good order and condition marked "L. N. & Co.," consigned to the order of said Wilbur & Co., that by said bill of lading it was also agreed, that said caustic soda should, dangers of navigation, &c., excepted, be delivered in like good order to the consignee at St. Louis; that the said agents were duly authorized to execute and deliver bills of lading at New Orleans in behalf of said defendants, and of the said boat; that thereupon said Wilbur & Co., with said bill of lading in their possession on the same day made their certain bill of exchange of that date at New Orleans directed to Lewis, Nanson & Co., at St. Louis, a mer-

cantile firm at that place, and requested and ordered said drawees at ten days sight to pay to the order of said makers $2,400; that said Wilbur & Co. sold and transferred by written endorsement and assignment said bill of exchange and said bill of lading thereto attached, to plaintiff, who took and purchased the same on the faith and security of said bill of lading, and in due time caused said bill of exchange to be presented at St. Louis to said drawees for acceptance, which was refused; said bill of exchange was duly protested and notification thereof given to said Wilbur & Co., and afterwards, at the proper time, said bill of exchange was duly presented to said drawees at St. Louis for payment, payment demanded, payment re-
62 fused, and protest made for such refusal, and due notice given to Wilbur & Co.; that when the boat reached St. Louis plaintiff presented the bill of lading to said defendants and proper agents on said boat, demanded the delivery of the eighty-nine drums of caustic soda, but defendant only delivered five of said drums, and failed and refused to deliver the residue; that said five drums were only worth $146.27, that being the amount plaintiff received therefor, but that the eighty-four drums, which defendants failed and refused to deliver, were worth $2,456, that the same were not lost, nor their delivery to plaintiff prevented, by the danger of navigation, &c., but only by the negligence and mismanagement of defendants, their agents and employees; that no part of the bill of exchange, except the sum for which the five drums of caustic soda sold, had ever been paid on the bill of exchange; that Wilbur & Co. had become and were insolvent; that by reason of the premises and of defendants' refusal to deliver said eighty-four drums of caustic soda, and of the negligence and mismanagement of defendants, their agents and employees, plaintiff was damaged in the sum of $2,500, for which judgment was asked. The bill of lading referred to in the petition was signed "per Sinnoth & Adams, agents, Jos. Cooper."

The defendants answered, denying, that they had any agents in New Orleans or elsewhere, except the officers of the boat, denied the execution and delivery by themselves or agents of the bill of lading to Wilbur & Co., and that it was ever agreed that the eighty-nine drums of caustic soda should be delivered at St. Louis; averred they had no knowledge, &c., as to the acts of Wilbur & Co., or of plaintiff, respecting the alleged bill of lading, and the alleged bill of exchange; admitted the reception on their boat Mississippi, from Wil-
63 bur & Co., of five drums of caustic soda and their delivery to plaintiffs, but denied the reception on board the said boat of any more drums of caustic soda than the said five, which was the reason averred for the non-delivery of a greater number; denied that the eighty-four drums of caustic soda ever came on board the boat or into the custody of defendants, their servants or agents, denied all mismanagement, negligence, liability, &c.

A jury was impanneled to try the case, and testimony was introduced tending to show that the bill of exchange mentioned in plaintiff's petition was negotiated and purchased by the plaintiff from Wilbur & Co., through their broker, Fazened, in the usual course of business for full value and on the faith of the bill of lading

thereto attached; that Sinnoth & Adams were the agents of the boat Mississippi at New Orleans at the time the bill of lading bears date, that only five drums of caustic soda of same marks description and consignment as those mentioned in plaintiff's petition ever were received on board the — of lading for the steamer Mississippi on the production of dray receipts, i. e. receipts signed by the receiving clerk of the boat, acknowledging the delivery of the goods thereon specified; that James Cooper, the clerk of Sinnoth & Adams, signed bills of lading for them, and had authority from that firm to do so, but only when dray tickets were produced; but that he had no authority whatever to sign the bill of lading in question; nor was there any evidence tending to show that fact, or that dray tickets were produced at the time of signing the bill of lading, nor that the eighty-four drums of caustic soda ever were received on board the boat.

64 Plaintiff, after the above testimony was in, offered in evidence the bill of lading and the indorsement of Wilbur & Co., thereon, which on being objected to by defendants was excluded by the Court, and plaintiff excepted.

Plaintiff then asked several instructions looking to a recovery on the facts as proven, which instructions the court refused to give, and plaintiff excepted.

The court at the instance of defendants gave such instructions as precluded a verdict for plaintiff; whereupon plaintiff excepted, took a non-suit with leave, &c., and after moving unsuccessfully to set-aside the non-suit, and again excepting, this cause comes here by appeal.

The decision in this case will be an answer to this question:

Are the owners of a boat rendered liable at the suit of a third party, in consequence of a bill of lading having been issued for goods as shipped on board that boat by one apparently having authority therefore to the consignor named in such bill of lading, who negotiates a bill of exchange drawn on the consignee to such third party, who purchases, and has endorsed to him for value the bill of exchange, on the faith and on the security of the bill of lading, which is also transferred to him, without any knowledge or notice of lack of authority on the part of him, who signed the bill of lading, or that the goods recited in the bill of lading were never shipped?

65 A brief examination of the authorities cited by both appellant and respondents having any special reference to the point in hand will therefore be made.

Justice Curtis in Schooner Freeman vs. Buckingham, et al., 18 How. (U. S.), 182, says:

"If the signer of a bill of lading was not the master of a vessel, no one would suppose the vessel bound; and the reason is, because the bill is signed by one not in privity with the owner. But the same reason applies to a signature of a master made out of the course of his employment. The taker assumes the risk not only of the genuineness of the signature and of the fact that the signer was master of the vessel, but also of the apparent authority of the master to issue the bill of lading. * * * But the master of a vessel has no more

apparent unlimited authority to sign bills of lading, than he has to sign bills of sale of the ship. He has an apparent authority if the ship be a general one, to sign bills of lading for cargo actually shipped, and he has also authority to sign a bill of sale of the ship, when in case of disaster his power of sale arises. But the authority in each case arises out of, and depends upon a particular state of facts.

It is not an unlimited authority in the one case more than in the other, and his act in either case does not bind the owner, even in favor of an innocent purchaser, if the facts upon which his power depended did not exist; and it is incumbent on those who are about to change their conditions upon the faith of his authority, to ascertain the existence of all the facts upon which his authority depends."

66 To the same effect are Grant, et al., vs. Norway, et al., 2 Eng. Law and Eq., 337; Hubbersty, et al., vs. Ward, 8 Exch., 330; Francis T. Montell, et al., vs. The schooner William H. Rutan, and Chas. C. Rose, her master: (Reported in Intern. Rev. Rec., Vol. 1, p. 125, Parsons, Mart. L., Vol. 1, p. 135, and note 2.)

All these were cases where proceedings were instituted by third parties (to whom the bills of lading had been assigned or who had made advances thereon for value on the faith and security of bills) against the vessel, as libellants or against the owners for damages arising from the tota' or partial non-delivery of goods mentioned in the bills of lading.

In Montell vs. The Schooner William H. Rutan, supra, (in which case are cited 18 How. (U. S.), 182; 19 do 82; 2 Eng. L. and Eq. 337; 29 lb. 323) it is said:

"That a cardinal restriction which applies to this case is, that a master cannot subject a ship in rem., much less his co-owners, to a responsibility for a safe carriage or delivery of cargo not actually laden on board of it for transportation, in the lawful employment of the vessel. This principle is too firmly rooted in the doctrines of commercial jurisprudence to be subject to question in this country or in England.

"That as the libellants prove by the testimony of the master himself, that he executed the bill of lading with knowledge that the wheat was not on board at the time, the bill of lading was nugatory

67 and fraudulent as to the vessel and all her co-owners, except the master himself."

The case of Strong vs. G. T. R. W. Co., 6 Am. L. Reg., 680, was a suit between the owners of a vessel and an intermediate consignee to the right to deduct the value of a "shortage" in the cargo, and the point under discussion was only incidentially alluded to, and the allusion was therefore a mere obiter dictum.

Dickerson vs. Seelye, 12 Barb. 99, was an action brought for freight by the plaintiff, who himself being the owner and master had signed the bill of lading, and it was held that defendant, a purchaser in good faith of that bill, might on the trial, by way of diminishing the amount of plaintiff's recovery, show that the amount of coal called for in the bill had not been delivered.

Meyer vs. Peck, 28 N. Y. 590, was the suit of the assignee of a claim for freight against the shipper, and the point now being considered was not in the case, but merely received a passing notice. It seems also that the captain of a canal boat was its owner; that the claim for freight was due to him, and that he was the assignor of that claim.

Howard, et al., vs. Tucker, et al., 1 Barnw. and Adolph, 712, was only a contest between parties (one of whom was an assignee for value of a bill of lading, which recited that the freight had been paid,) respecting the right of defendants to retain money to reimburse themselves for money paid for that freight against the
68 express directions of their principals, and when the bill of lading recited payment of the amount due for freight.

It will thus be seen from the above cited authorities, that the interrogatiory propounded at the outset must meet with a reply in the negative.

It is a well settled maxim in Admiralty Jurisprudence, that "Freight is the mother of wages," and under the circumstances detailed in evidence here, so far as charging the owners of the boat is concerned, the actual delivery of the goods on board occupies towards the bill of lading for those goods the same maternal relation.

It would seem that there is an element of hardship in this case, but it is a hardship, which could readily have been avoided had those precautionary measures and inquiries, (which the law enjoins upon those about to purchase these quasi negotiable instruments or bills of exchange secured thereby) been pursued.

For these reasons the action of the court below was undoubtedly correct, and its judgment will be affirmed.

Judge Wagner absent, the other Judges concur.

69 EXHIBIT "C."

Kansas City Court of Appeals, May 21st, 1894.

Ætna National Bank, Respondent, vs. Water Power Company et al., Appellants.

Bills of Lading: warehouse receipts statute. Chapter 18, Revised Statutes 1889, provides first a certain and substantial foundation for warehouse receipts and bills of lading to rest upon, and upon which only they are to be issued, and then declares them to be negotiable by written endorsements so that they may pass from hand to hand in commercial exchange and that the buyer may know that he is purchasing a thing of substance and that the commodity so named is actually in the hands of the issuer. It so prevents the issue of false bills of lading.

Where a railroad corporation in Missouri issues its bill of lading reciting it has received a car load of flour in apparent good order for transportation to New Orleans and at the time the flour is in the state of Kansas in the possession of another railroad transporting it

to Missouri, such bill of lading is void and carries no title and the delivery of such bill of lading is not a delivery of the commodity named therein, though at the time of its issuance the receiver
70 of the bill surrendered the Kansas railroad bill of lading therefor.

Symbolical Delivery: statute. The delivery of a bill of lading is, in theory of law, for certain purposes, when properly endorsed, symbolical delivery of the commodity it represents, but the statute is designed to distinguish between things symbolical and things in fact and requires the issue of the bill of lading to have at the time of its issue possession of the commodity it represents; and this interpretation is not altered by the fact that the statute confers upon the injury- party a right of action against the transportation company for issuing a false bill of lading.

Construction: If the words of the statute are plain and unambiguous it does not need the aid of a reason for its enactment, its command stands for a reason; but many reasons are suggested for the enactment of the statute in question.

Delivery: The delivery of the flour to the car at the shipping point in Kansas does not fill the requirement of the statute, as such delivery was not to a car in the control or possession of the Missouri railroad, nor where it could have possession of the car in its usual course of business. The bill of lading does not purport to be evidence of the delivery of the flour to the car belonging to and in the possession of the Kansas railway company, but to acknowledge the receipt of merchandise at Kansas City by the Missouri company for shipment to New Orleans.

71 Replevin: Plaintiff's title vs. defendant's title. In replevin the plaintiff must rely on the strength of his own title and not on the weakness of the defendant's title, and where plaintiff's title is founded upon a fraudulent, void and unlawful bill of lading it is immaterial what the defendant's title is.

Appeal from Jackson Circuit Court—Hon. Ed. L. Scarritt, Judge—Affirmed.

ELLISON, *J.*:

This is an action of replevin for a car load of flour in which judgment was given for the defendants by the court below and the plaintiff has appealed.

The facts necessary to an understanding of the legal points involved, are these: The defendant Water company is a company doing business at Hutchinson, in the state of Kansas, and, on the 17th day of September, 1892, was the owner of the flour. On that day it entered into an agreement with one Gorsuch, residing and doing business at Kansas City, Missouri, for the sale of the flour to him, and, in pursuance of such agreement, said Water company delivered the flour for shipment to The Atchison, Topeka and Santa Fe Railway Company, in one of that company's cars, number 19686, and took the company's bill of lading therefor, consigning the flour to Gorsuch, at Memphis, Tennessee, by way of Kansas City. The de-

fendant then sent the bill of lading with a draft for $194.43, due in thirty days, on Gorsuch for the price of the flour, to the National Bank of Kansas City, with instructions to deliver the bill of lading to Gorsuch upon his acceptance of the draft. Said bill of
72 lading and draft were duly received by the National Bank of Kansas City on September 19, and the draft was accepted by Gorsuch, the bank turning over to him the bill of lading. Gorsuch on that day took the bill of lading so issued by the Atchinson, Topeka and Santa Fe (the flour not yet having arrived at Kansas City) to the Kansas City, Fort Scott and Memphis Railway Company, which latter road, on the surrender to it of the bill of lading issued by the former at Hutchinson, Kansas, issued its bill of lading for the flour to said Gorsuch in the usual form, reciting that it had received the flour in apparent good order and condition, and consigning the flour to Gorsuch at New Orleans, with instructions to notify Harrison & Company, of the latter city. At this time the flour was in the possession of the Atchinson, Topeka and Santa Fe Railway Company, and was in course of transit to Kansas City from Hutchinson, Kansas. Afterwards, on the same day, Gorsuch drew a draft in favor of paintiff for $150, on said Harrison & Company at New Orleans and delivered the draft and bill of lading last issued as aforesaid to plaintiff. Three days thereafter, on September 21st, the Water Power Company, having learned that Gorsuch had become insolvent, notified the Atchinson, Topeka and Santa Fe Railway Company not to deliver the flour either to Gorsuch or to the Kansas City, Fort Scott and Memphis road, said Water Power Company intending thereby to exercise its power of stoppage in transit on account of the unpaid purchase price of the flour. Thereafter on September 23rd, the defendant Water Power Company replevied the flour from the Atchison, Topeka and Santa Fe at Kansas City, Missouri, where it had by this time arrived. On a writ issued in that suit the flour was taken by a constable; and afterwards on the twenty sixth of September, this plaintiff brought this suit in replevin,
73 making the Water Power Company, the constable and the Atchison, Topeka and Santa Fe defendants.

One ground of defense is that the bill of lading issued by the Kansas City, Fort Scott and Memphis Railway Company, under which plaintiff claims, is made fraudulent and void by Chapter 18, Revised Statutes 1889, for the reason that said road had not received the flour at the time it issued the bill of lading. By the provisions of that Chapter no warehouseman, wharfinger, or other person is permitted to issue a receipt or voucher for merchandise, grain, flour or other produce to any person unless the same "shall have been actually received into the store or upon the premises of such warehouseman or wharfinger or other person, and shall be in the store or on the premises aforesaid and under his control at the time of issuing such receipt." There are also further provisions intending to forbid the issuing of such receipts for money loaned, etc., unless the merchandise or other commodity was actually in the custody upon the premises of such warehouseman, etc. Then follow section 743 of said statute pertaining to bills of lading reading as follows:

"No master, owner or agent of any boat or vessel of any description, forwarder or officer or agent of any railroad, transfer or transportation company, or other person, shall sign or give any bill of lading, receipt or other voucher or document for any merchandise or property by which it shall appear that such merchandise or property has been shipped on board of any boat, vessel, railroad car or other vehicle, unless the same shall have been actually shipped and put on board, and shall be at the time actually on board or delivered to such boat, vessel, car or other vehicle to be carried and conveyed as expressed in such bill of lading, receipt other, voucher or document."

74 This is followed by a provision making all such warehouse receipts and bills of lading negotiable by written endorsement in the same manner as bills of exchange and promissory notes; and also providing that the transferee of such receipts or bills of lading shall be deemed and held to be the owner of such goods, merchandise, grain, flour or other commodity. These several provisions are followed by two sections whereby it — declared to be a criminal offense with severe punishment for any warehouseman, wharfinger, forwarder, carrier or other person, or their agents, to violate any of the provisions we have stated, and preserving to any party injured by such violation a civil action against the wrongdoer.

The general schemen of this statute is evidence. It first lays a certain and substantial foundation for warehouse receipts and bills of lading to rest upon and upon which only they are to be issued. And then proceeds to declare them to be negotiable by written endorsement so that they may be passed from hand to hand in commercial exchange, and that the buyer thereof may know that he is purchasing a thing of substance and that the commodity named by them is actually in the hands of him who issued them. It is this reliance which gives them their value. It is such reliance that the purchaser builds upon and upon the faith of which he invests his money. And so it has been declared by the Supreme Court that "The title of this Chapter and every section of the act, indicates the purpose of its enactment. It was designed to prevent the issuing of false bills of lading and warehouse receipts." State vs. Kirby, 115 Mo. 440. Applying this to the facts of this case, we find the Kansas City, Fort Scott and Memphis Railroad Company has issued a bill of lading at Kansas City (the only pretense made is that the

75 transaction occurred at Kansas City) which the conceded facts demonstrate to be false. It recites that the company has received on September 19th, "in apparent good order" the car load of flour in controversy for transportation to New Orleans. The fact that it had not received the flour, nor was it ever received, nor did the company's officers or agents know there was such flour in existence except as they may have relied upon the bill of lading issued by the Atchinson, Topeka and Santa Fe Company. These officers or agents did not know where such flour was, whether in Kansas or California or Canada. For, on their own theory of doing such business as shown in evidence, the Atchinson, Topeka and Santa Fe Company may have done as they did and issued its bill of lading

on the strength or faith of some other bill of lading without having possession of the flour.

But plaintiff has pressed upon our attention the point that a delivery of a bill of lading is a delivery of the commodity named therein; and that therefore when Gorsuch delivered the Atchinson, Topeka and Santa Fe bill of lading to the Kansas City, Fort Scott and Memphis Company he delivered the flour to that company. The delivery of a bill of lading is, in theory of law, for certain purposes, when properly endorsed, a symbolical delivery of the commodity it represents. A symbol is a representation of a thing but it is not the thing itself; and if ever a statute was designed to distinguish between things symbolical and things in fact it is the one now being construed. What stronger or more apt words could have been used by the lawmakers to convey the meaning that the commodity expressed to be received must have been in fact actually received? On plaintiff's theory the warehouseman's receipt could be delivered
76 from warehouseman to warehouseman, each issuing upon the faith of the other and infinitum. Thus the receipt freshly issued each reciting a falsehood, could be negotiated for months after the commodity represented to be thus "delivered," as plaintiff would have it, had been destroyed by fire or flood. And thus the bill of lading could pass from one transportation company to another and finally be negotiated to an innocent purchaser long after the commodity represented by the bill of lading had been lost or destroyed in the numberless ways in which goods are lost or destroyed in the course of transportation. It is no answer to this to say that the injured party would have a right of action against the transportation company for issuing the bill of lading in such case. The injured party would have had such action in the absence of such a statute. And while the statute preserves this action such is not its prime object. Its object, it might be said, is to avoid the necessity for such action by requiring the actual fact to be as represented by the bill. If the words of a statute be plain and unambiguous it does not need the aid of a reason for its enactment. It has been said that its command stands for a reason. But there are many reasons for this statute as we here interpret it. For instance, a person in St. Louis purchases a bill of lading which was issued the day before at Kansas City by a Kansas City railroad reciting that such road had received a car of California fruit in good order for continued transit to St. Louis. The purchaser believing the bill to state facts and not symbols parts with his money in the belief that the risks and dangers attending a shipment over such great distance of such a delicate commodity has been already substantially overcome. But he learns upon investigation that the fruit has never arrived in Kansas City—had not been received by such railroad—had not gotten further along in the course of transportation than the deserts of Ne-
77 vada where it perished from the delay or other cause.

We have had cases in this court where potatoes and other vegetables have been shipped to Kansas City from Dakota and upon arrival here were found to have been frozen while in transit. Such vegetables are sometimes sent on to the southern market. Is it al-

lowable, under our statute, for a railroad company at Kansas City to issue a bill of lading reciting that it has received in good order such commodity, when in fact they are sidetracked in Dakota and will never reach here, and by this means impose upon the purchaser of a bill of lading at Memphis, New Orleans or Mobile? We think it would be an absolute avoidance of the statute to permit it to be done.

There has been something said by counsel to the effect that there was an actual delivery of the flour at Hutchinson, Kansas, "to the car," and that this filled the requirement of the statute. It was so shown in the evidence. But we do not think that this does fill the requirement of the statute. The delivery was not to a car in the control or possession of the Kansas City, Fort Scott and Memphis road. The delivery was not even to a car where that road could possibly have had possession in its course of business as a carrier; since the car was at a distance in another state and in the possession of another corporation and which never did come into the possession of the Kansas City, Fort Scott and Memphis road; having, as before stated, been taken from the possession of the Atchison, Topeka and Santa Fe road by replevin. Besides the bill of lading does not purport to be evidence of the delivery of flour "to a car" belonging to
78 and in possession of another railroad in Kansas. It purports to acknowledge the receipt of the merchandise at Kansas City by the Kansas City, Fort Scott and Memphis road for shipment to New Orleans.

Plaintiff seeks to show here that the defendant, Water Power Company, had no right to stop the flour in transit by reason of matters suggested not necessary to refer to in detail since in our opinion, plaintiff must rely upon the strength of its own title to the property or right to the possession thereof. Updyke vs. Wheeler, 37 Mo. App. 680. Teichman vs. American Bank, 27 Mo. App. 676. Boler vs. Cohen, 48 Mo. App. 97. Plaintiff's title is founded upon a fraudulent, void and unlawful bill of lading issued in the face of the prohibition of the statute and it in consequence has no title or right to the possession which could support a judgment in its favor.

The result of the views to which we have given expression is to approve of the interpretation given to the state by the Circuit Court and we therefore affirm the judgment. Gill, J., concurs. Smith, P. J., not sitting.

Thereafter the defendant filed its demurrer to the reply of the plaintiffs, as follows:

79 *Demurrer to Reply.*

Comes now the defendant herein, Missouri, Kansas & Texas Railway Company, and demurs to the reply of the plaintiffs to the amended answer of the defendant for the reason that said reply does not state facts sufficient to constitute a reply to defendant's amended answer herein.

JOHN MADDEN,
W. W. BROWN,
Attorneys for Defendant.

On the 22nd day of January, 1910, this case came on for hearing upon the demurrer of the defendant to the reply of the plaintiffs, and the court sustained the demurrer. To which ruling the plaintiffs excepted.

This ruling was reversed by the Supreme Court, 84 Kan. 479.

80 *Supplemental Answer.*

On or about July 12, 1913, with the consent of the court, the defendant filed its supplemental answer herein, which supplemental answer, omitting caption and signatures of attorneys is in words and figures as follows, to-wit:

Comes now the defendant and for its supplemental answer herein alleges that the two notes described in plaintiffs' amended petition as having been executed and delivered by J. K. Davidson to Hutchings, Sealy & Company, dated October 6, 1900, each for the sum of $2,407.95, and which is alleged to remain unpaid at the beginning of this action, were, on a date not known to this defendant, signed, endorsed and delivered to Fred M. Harris, and became a property of said Fred M. Harris; that on or about September 7, 1906, said Fred M. Harris brought suit on said notes against said Jos. K. Davidson, in the Circuit Court of Jackson County, Missouri, at Independence; that on or about October 17, 1907, said Fred M. Harris obtained a judgment in said suit against said Jos. K. Davidson on said notes and causes of action set up in that suit, in the sum of
81 $6,260.66, together with the costs of the action, said judgment to bear interest from that date at the rate of 6 per cent. per annum; execution was awarded. That since said date, under process of execution and of garnishment, the property of the defendant Jos. K. Davidson was seized sufficient to discharge and pay said judgment in full, and said judgment has been paid in full out of the property of said defendant Jos. K. Davidson.

Wherefore, defendant prays as in its amended answer herein.

Trial.

Thereupon, on July 12, 1913, this action came on for trial.

Plaintiffs' Evidence.

A jury was waived and the case was submitted to the court.

It was agreed between the parties that any decision of the Supreme Court of Missouri, or of any appellate court of Mis-
82 souri, which any counsel in the case may call to the attention of the court or the Supreme Court of Kansas, or any other court, may be construed as having been offered in evidence; that the Constitution of the State of Missouri and its amendment creating the Kansas City Court of Appeals, and the St. Louis Court of

Appeals, and the statutes creating the Springfield Court of Appeals, may be regarded as having been offered in evidence.

Plaintiffs thereupon offered in evidence the original twenty-seven (27) bills of lading, which are in substance the same as Exhibit "A" attached to plaintiffs' amended petition herein.

Defendant objected to the introduction of said bills of lading, on the ground that the evidence was irrelevant, incompetent and immaterial, and that the bills of lading were void under the laws of the State of Missouri and the Interstate Commerce laws. The objection was overruled, to which ruling the defendant excepted.

F. A. LELAND testified on behalf of plaintiff, that in June, 1911, he was assistant General Freight Agent of the defendant at Kansas City, Missouri, whose duties were the solicitation of freight business; that the defendant maintained a general freight office, and a
83 freight agent in Kansas City, in that part of Kansas City known as "The Bottoms." That in the organization of the Missouri, Kansas & Texas Railway Company, A. A. Allen was General Manager of the company and was in charge of all departments of the road. Immediately under him was C. Haile, who was vice-President and Traffic Manager, and was in charge of traffic, both passenger and freight; that reporting to said Traffic Manager were the two divisions, the General Freight Agent and the General Passenger Agent; that the General Freight Agent, Mr. A. T. Drew, was located at St. Louis, Missouri, and to him the witness, as assistant General Freight Agent, reported; that there were other assistant general freight agents, one located at Houston, Texas, and one at St. Louis. That the one at St. Louis was in the office of the General Freight Agent, and his duties were different from that of the assistant general freight agents located as was the witness, at points outside of St. Louis; that the freight office located in "The Bottoms" had general authority to issue bills of lading, and such was a part of the regular business of the agent at the freight depot; that for the accommodation of grain shippers, principally, the office of the witness at Kansas City sometimes issued bills of lading; but, such was not among its usual duties; that such bills of lading were usually issued by the Chief Clerk; that the bills of lading in question were not issued by the Chief Clerk of the witness; but,
84 by some one in the office, unknown to the witness; that neither the witness, nor anyone in his office, had any authority to issue a bill of lading for wheat not received by the company, or in its possession; that J. K. Davidson was shipping wheat every day in great quantities; that on the days in question, being June 13th to 16th, 1906, sixty (60) bills of lading were issued to J. K. Davidson; thirty-three (33) cars of wheat were loaded and received by the defendant and carried to destination; twenty-seven (27) bills of lading were issued on cars of wheat that were not in possession of the defendant and never came to its possession; that these sixty (60) bills of lading were issued on the representation of an agent of said J. K. Davidson the cars of wheat had been delivered to the defendant for shipment, and no bill of lading was

issued by the witness, or anyone in his office, knowing that the car of wheat de-cribed had not been delivered to the defendant for shipment, and it was not the intention of said Leland, or any of his employes to issue any bill of lading without first having the wheat loaded in the car and in the possession of the defendant for the purpose of shipment; that witness had no authority to issue a bill of lading without receipt of the freight to be shipped.

W. H. FRAZELL testified for the plaintiffs that at Kansas City, the price of wheat in June, 1900, was fifty-three (53) cents
85 per bushel.

JOHY SEALY, one of the plaintiffs, testified that thirty-three (33) cars, or 36,211 bushels, were sold July 6, 1900, at seventy (70) cents a bushel. Total amount $25,347.70; that plaintiffs advanced to J. K. Davidson, on June 15th, 16th and 18th, an aggregate sum of $37,200.00, being the amounts advanced on said shipments of sixty (60) carloads. Plaintiffs charged said J. K. Davidson interest on June 20th, to date, $117.18, and on October 12th, interest to August 1st, $382.66. Plaintiffs also charged J. K. Davidson insurance on grain to August 1st, $50.40. Plaintiffs also claimed that there was due said plaintiffs on July 1st, the sum of $41,044.34, due from Davidson. A full stat-ment from June 1st, 1900, to October 12th, 1900, as follows:

86

J. K. Davidson & Co. — Hutchings, Sealy & Co. (Unincorporated) In Account with Bankers.

1900.		Kansas City, Mo.	1900.		Galveston, Texas.
June	1. Balance	110,103.18	June	1	37,955.00
	2. 9,887	34,592.00		1	9,987.50
	4. 90	4,778.13		4	92,883.75
	4. 88	26,034.67		5	11,985.00
	6. 94	5,435.33		11	61,922.50
	7. 95	13,308.81		11	4,888.70
	8. 98	3,407.42		14	13,982.50
	8. 97	20,000.00		19	10,986.25
	9. 906	19,132.32			
	11. 13	10,000.00			
	12. 15	5,504.00		Bal	41,044.34
	14. 18	14,000.00			
	15. 19	10,944.00			
	16. 21	2,730.67			
	18. 22	13,000.00			
	18. 23	10,525.33			
	20. Int. to date	117.18			
		80,361.04			80,361.04

87

July	1. Ledger 183	41,044.34	July	13. Brown return pms.	120.00
	3. Chas. R. Brown...	31.80		31. Bal.	40,967.69
	10. Grain Inspector ..	11.55			
		41,087.69			41,087.69
Aug.	1. Bal.	40,967.69	Aug.	1. Sale wheat	25,347.70
	2. Karnes N. & K...	100.00		31. Bal.	15,818.14
	2. Wm. Ballinger ...	47.75			
	16. Ins. Grain to Aug. 1	50.40			
		41,165.84			41,165.84
Sept.	1. Bal.	15,818.14	Oct.	12. Cancel Dr. Aug. 2.	100.00
Oct.	12. Int. to Aug. 1.....	382.66		12. Concel Dr. Aug. 2.	47.75
		16,200.80		12. Bal.	16,053.05
					$16,200.80
Oct.	12. Bal.	16,053.05			

88 The amount advanced on shipments was sixty-four (64) cents per bushel. The seventy (70) cents per bushel received for the wheat on July 6th, was net. Witness does not know on what cars advancements were made. Advancements made after June 15th, 1900, were on the sixty (60) cars. Witness does not know how much was advanced on the twenty-seven (27) cars of wheat. Plaintiffs are seeking to collect any balance due from J. K. Davidson. The first of the notes given by Davidson was paid on April 11, 1901, together with $73.22 interest. The second note was paid on October 11, 1901, together with $145.69 interest. On October 11, 1901, all interest on the third and fourth notes was paid to October 6, 1901, the amount so paid being $288.95.

On April 28, 1905, the causes of action were assigned to Fred M. Harris by a written instrument copy of which is as follows:

This Instrument, Executed this 28th day of April, 1905, by John Sealy, Sealy Hutchings, George Sealy, Jr., and H. O. Stein, partners doing business as Hutchings, Sealy & Company, Witnesseth:

1. At all times from and after the first day of June, 1900, to and including the 14th day of December, 1901, J. H. Hutch-

89 ings, Sealy Hutchings, George Sealy, Sr., John Sealy and H. O. Stein were each and all citizens and residents of the State of Texas, and on December 14, 1901, George Sealy, Sr., who was then a citizen and resident of the State of Texas, departed this life; and thereupon, under and by virtue of the laws of Texas, the title to the causes of action hereinafter mentioned vested in and passed to the remaining partners, J. H. Hutchings, Sealy Hutchings, John Sealy and H. O. Stein.

2. Thereafter, for a valuable consideration, J. H. Hutchings assigned and transferred unto John Sealy all his right, title and interest in and to the causes of action hereinafter mentioned.

3. Thereafter John Sealy, Sealy Hutchings and H. O. Stein, being the owners of the cause of action hereinafter mentioned, did assign an interest therein to George Sealy, Jr., and did admit him as a

member of the partnership in the firm of Hutchings, Sealy & Company; and thereupon John Sealy, Sealy Hutchings, George Sealy, Jr., and H. O. Stein became and are partners as Hutchings, Sealy & Company.

4. Prior to December 14, 1901, the persons then composing the firm of Hutchings, Sealy & Company were the owners of a cause of action against the Missouri, Kansas & Texas Railway Com-
90 pany, growing out of the issuance by this company at Kansas City, Missouri, in June, 1900, of twenty-seven bills of lading, each calling for one carload of bulk wheat and the delivery by the railway company of these bills of lading to Joseph K. Davidson, doing business as J. K. Davidson & Company. These bills of lading were then delivered by J. K. Davidson & Company to the persons then composing the firm of Hutchings, Sealy & Company, and on the faith and strength of these bills of lading Hutchings, Sealy & Company advanced to J. K. Davidson & Company the sum of approximately seventeen thousand ($17,000) dollars. The recitals contained in these bills of lading were not true, and the wheat therein mentioned was not in the possession of the Missouri, Kansas & Texas Railway Company and was never delivered by the Missouri, Kansas & Texas Railway Company to Hutchings, Sealy & Company. The particulars of these causes of action are particularly set forth in a suit now pending in the District Court of Labette County, Kansas, wherein the assignors herein named are plaintiffs and the Missouri, Kansas & Texas Railway Company is defendant.

Now Therefore, In consideration of the sum of one dollar cash in hand to them paid, the receipt of which is hereby acknowledged, and of other good and valuable considerations, and for the
91 purpose of fully vesting in Fred M. Harris the title to these causes of action, the undersigned John Sealy, Sealy Hutchings, George Sealy, Jr., and H. O. Stein, partners as Hutchings, Sealy & Company, do hereby assign and transfer unto Fred M. Harris, all their right, title, and interest in and to the causes of action hereinbefore mentioned, and do hereby authorize Fred M. Harris in his own name to take all steps necessary to a collection of the amount due and owing thereon.

In witness whereof, we have hereunto set our hands and seals this 28th day of April, 1905.

JOHN SEALY,
SEALY HUTCHINGS,
GEO. SEALY, JR.,
H. O. STEIN,
Partners, as Hutchings, Sealy & Company.

Defendant's Evidence.

Defendant offered in evidence the statutes of Missouri, words and figures the same as set out in defendant's answer, paragraphs 9 and 10.

92 Defendant further offered in evidence certified copies of pleadings and papers in the suit of Fred M. Harris v. J. K.

Davidson, brought in the Circuit Court of Jackson County, Missouri, at Independence, which papers and pleadings, were in words and figures as follows, to-wit:

In the Circuit Court of Jackson County, Missouri, at Independence, September Term, 1906.

17238.

FRED M. HARRIS, Plaintiff,

v.

JOSEPH K. DAVIDSON, Defendant.

For a first cause of action against the defendant, plaintiff avers that heretofore, on October 6, 1900, the defendant under the name of J. K. Davidson, executed his principal promissory note expressed on its face to be for value received, by which he promised eighteen months after date thereof, to pay to the order of Hutchings, Sealy & Company, a partnership, the sum of $2,407.95, with interest from the date of said note at the rate of six per cent per annum, payable annually. The interest on this note has been paid to October 6, 1902, but the principal thereof, together with interest from
93 the date named is unpaid. Thereafter, for a valuable consideration, Hutchings, Sealy & Company, assigned and transferred this note to the plaintiff herein who is now the legal owner and holder thereof. A duly verified copy of this note is hereto attached marked Exhibit A.

Wherefore plaintiff prays judgment against the defendant in the sum of $2,407.95, together with interest from October 6, 1902, at the rate of six per cent per annum, and the costs of this suit.

For a second cause of action against the defendant, plaintiff avers that heretofore, on October 6, 1900, the defendant under the name of J. K. Davidson, executed his principal promissory note expressed on its face to be for value received, by which he promised, twenty-four months after date thereof, to pay to the order of Hutchings, Sealy & Company, a partnership, the sum of $2,407.95 with interest from the date of said note at the rate of six per cent per annum, payable annually. The interest on this note has been paid to October 6, 1902, but the principal thereof, together with interest from the date named, is unpaid. Thereafter, for a valuable consideration, Hutchings, Sealy & Company, assigned and transferred this note to the plaintiff herein, who is now the legal owner and holder
94 thereof. A duly verified copy of this note is hereto attached marked Exhibit B.

Wherefore plaintiff prays judgment against the defendant in the

sum of $2,407.95, together with interest from October 6, 1902, at the rate of six per cent per annum, and the costs of this suit.

KARNES, NEW & KRAUTHOFF,
Attorneys for Plaintiff.

Filed, Aug. 16, 1906. Harry G. Henley, Clerk, by A. J. Henley, Deputy.

95 In the Circuit Court of Jackson County, at Independence, September Term, 1906.

No. 17238.

FRED M. HARRIS, Plaintiff,

v.

JOSEPH K. DAVIDSON, Defendant.

Answer.

Now comes the defendant in the above entitled cause and for his answer to the first court of plaintiff's petition therein, admits the execution of the note described in the said first count on October 6th, 1900, and denies each and every other allegation in the first count of the said petition contained.

And for another and further answer and defense to the said first count of plaintiff's petition, the defendant denies that he or any person in his behalf has paid any interest upon the said note
96 but on the contrary avers that if any credits appear thereon the same have been made fraudulently by the plaintiff or his assignors for the purpose of saving the said note from the bar of the statute of limitations as hereinafter set up.

And for another and further defense to the plaintiff's cause of action as set forth in the said first count of his petition, the defendant avers that the note therein described and sued on was executed in Texas, to be paid in Texas, and arose out of business transacted and completed wholly within the said State of Texas and that the cause of action of plaintiff and his assignors (if any they have) arose in the said State of Texas; that the statutes of the said State of Texas in force and effect now provide, and at all the times mentioned in the plaintiff's petition did provide that such cause of action shall be barred unless within four years after it accrues a suit shall be begun and prosecuted thereon, and that by reason of the premises and in virtue of Section 4280 of the Revised Statutes of Missouri of 1899, the cause of action of the plaintiff and his assignors was forever barred on the sixth day of April, 1906.

Wherefore, having fully answered the defendant prays judgment upon the first count of the plaintiff's said petition and for his costs herein expended.

97 For his answer to the second count of the plaintiff's petition, the defendant admits the execution of the note in said second count described, on the sixth day of October, 1900, as in said petition allege, but denies each and every other allegation in the said second count contained.

And for further answer and defense to the said second count of plaintiff's petition, the defendant avers that the plaintiff herein gave no consideration whatever for the alleged assignment to him from Hutchings, Sealy & Company of the note sued on in this case, but on the contrary accepted the same after maturity and merely for collection and from the purpose of avoiding the defendant's counterclaim as hereinafter set forth.

This defendant further states that from about the first day of June to the first day of October, 1900, he was the owner of 33,000 bushels of wheat then stored in a certain elevator in the City of Galveston, Texas, and that the said Hutchings, Sealy & Company had advanced to this defendant upon the said wheat, certain sums of money and that the said Hutchings, Sealy & Company had been accustomed and it was their duty in the course of previous dealings between them and this defendant to make for him, at his direction,

98 sales of wheat or other grain upon which they had made advancements to him; that on or about the 30th day of September, 1900, the said wheat was of the reasonable market value at Galveston, Texas, of 85c. per bushel and could have been sold by the said Hutchings, Sealy & Company for that price, and that on or about the last named day this defendant instructed the said Hutchings, Sealy & Company to sell the said wheat for his account, but that they failed, omitted and neglected to comply with the aforesaid direction but wrongfully held the said wheat until the market price thereof declined from 85 cents per bushel to 70 cents when they thereupon sold the said wheat at and for the price of 70 cents per bushel, whereas they could have and should have previously sold the same for 85 cents per bushel whereby they damaged the defendant in the sum of forty-eight hundred ($4800) dollars; that by reason of the premises the defendant is not indebted to the said Hutchings, Sealy & Company in any sum whatsoever and is entitled to set off his damage against any recovery on the note sued upon in the second count of plaintiff's petition.

Wherefore, having fully answered the second court of plaintiff's said petition, defendant prays judgment in his favor together

99 with his costs herein expended.

____ ____,
Attorney for Defendant.

Filed Sept. 7, 1906. Harry G. Henley, Clerk. Jno. L. Labb, Deputy.

In the Circuit Court of Jackson County, Missouri, at Independence.

No. 17238.

FRED M. HARRIS, Plaintiff,

v.

JOSEPH K. DAVIDSON, Defendant.

Now on this day comes the plaintiff and moves the court to strike out of the answer filed by the defendant herein, the following language:

This defendant further states that from about the first day of June to the first day of October, 1900, he was the owner of 33,000 bushels of wheat then stored in a certain elevator in the city of Galveston, Texas, and that the said Hutchings, Sealy & Company had advanced to this defendant upon the said wheat certain sums of money, and that the said Hutchings, Sealy & Company had been accustomed and it was their duty in the course of previous
100 dealings between them and this defendant, to make for him, at his direction, sales of wheat or other grain upon which they had made advancements to him; that on or about the 30th day of September, 1900, the said wheat was of the reasonable market value at Galveston, Texas, of 85 cents per bushel and could have been sold by the said Hutchings, Sealy & Company for that price, and that on or about the last named day this defendant instructed the said Hutchings, Sealy & Company to sell the said wheat for his account, but that they failed, omitted and neglected to comply with the aforesaid direction, but wrongfully held the said wheat until the market price thereof declined from 85 cents per bushel to 70 cents per bushel when they thereupon sold the said wheat at and for the price of 70 cents per bushel, whereas they could have and should have previously sold the same for 85 cents per bushel whereby they damaged the defendant in the sum of forty-eight hundred ($4800) dollars; that by reason of the premises the defendant is not indebted to the said Hutchings, Sealy & Company in any sum whatever and is entitled to set off his said damage against any recovery on the note sued upon in the second count of plaintiff's petition.

And for grounds of this motion the plaintiff says the matters and facts pleaded in the foregoing portion of the answer so moved to be stricken out are not properly pleadable in this action, and are not a matter of defense nor counter claim nor set off herein.

KARNES, NEW & KRAUTHOFF,
Attorneys for Plaintiff.

Filed April 1, 1907. Oscar Hochland, Clerk, by William E. Smith, Deputy.

101 On the issues joined, judgment was entered in behalf of the plaintiff, Fred M. Harris, against the defendant J. K.

Davidson for this amount of the notes and interest and the costs of the action, and execution issued on said judgment. Property of the defendant was levied upon, sold, and bought by agents of the plaintiff. Garnishment process was issued and certain collections made, as shown by the findings of the court herein.

Defendant introduced in evidence, the stipulation between plaintiffs and the defendant, as follows:

Stipulation.

I.

There is an action pending in the District Court of Labette County, Kansas, wherein John Sealy and others are plaintiffs and Missouri, Kansas & Texas Railway Company is defendant. There is an action pending in the Circuit Court of Jackson County, Missouri, wherein Fred M. Harris, as assignee of Hutchings, Sealy & Company, is plaintiff and Missouri, Kansas & Texas Railway Company is defendant, No. 24,709. In each of said cases Missouri, Kansas & Texas Railway Company denies liability.

102 II.

Joseph K. Davidson executed two promissory notes to Hutchings, Sealy & Company covering the claims set up by plaintiff in the two suits described in Paragraph 1, and these two notes were assigned by Hutchings, Sealy & Company to Fred M. Harris, on which notes Fred M. Harris recovered judgment in the Circuit Court of Jackson County, Missouri, at Independence, in an action wherein said Fred M. Harris was plaintiff and Joseph K. Davidson was defendant. By virtue of executions issued out of said Court in said action and by virtue of sheriff's sales under said executions, property of said Joseph K. Davidson was levied on and sold and two deeds were executed to Edwin A. Krauthoff, purchaser at said sheriff's sales. Both of these deeds are of record in the office of the Recorder of Deeds of Jackson County, Missouri, and the value of said property is legally applicable to the payment of the claims asserted by plaintiff against the defendant in the suit described in paragraph 1.

III.

Said Edwin A. Krauthoff has been offered the sum of two thousand dollars ($2,000) in cash for a quit claim deed to said
103 property, to be executed by himself and wife, and said property can be sold for that amount.

It is agreed:

(*a*) That if said property is sold for two thousand dollars ($2,000) and the amount applied in payment of the judgment in the action described in Paragraph 2 herein, said Missouri, Kansas & Texas Railway Company, in the event that judgment shall be rendered against

it in either of the actions described in Paragraph 1, will not raise the question that said price of two thousand dollars is inadequate.

(*b*) This instrument shall not be construed against Missouri, Kansas & Texas Railway Company as an admission of liability, or as an admission or as a waiver of any defense asserted by the defendant in any of the actions referred to herein. It shall not be used as evidence against Missouri, Kansas & Texas Railway Company on the trial of either of said actions mentioned in Paragraph 1 herein, or on the trial of any action which may hereafter be commenced, based upon the transactions described in said suits.

Executed in duplicate, this 26th day of December, 1908, each to serve as an original.

104 MISSOURI, KANSAS & TEXAS RAILWAY CO.,
By A. A. ALLEN,
Vice-President & General Manager.
HUTCHINGS, SEALY & CO. (INCORPORATED),
By JOHN SEALY, *a Member of said Firm.*

Defendant further introduced in evidence the following letter, to-wit:

5-26-1909.

James Hagerman, Esq., Wainwright Bldg., St. Louis, Mo.

DEAR SIR: Referring to the conversation had in your office last Saturday by our Mr. Krauthoff, we have concluded for the present not to recommend a settlement of less than $2,000, and as we have your authority to make a settlement on this basis, it is not now necessary to take up your time with a view of getting your authority to a possibly less amount.

Yours truly,

KARNES, NEW & KRAUTHOFF.

Dic. K.

105 J. K. DAVIDSON testified for the defendant, that he is in the grain business at Muskogee, Oklahoma; that plaintiffs had brought suit in the Supreme Court of Texas against him; but, the suit was dismissed, and another suit was brought against him by plaintiffs in the Circuit Court of Jackson County, Missouri; that the value of the property levied upon in the suit of Harris v. Davidson, pending in the Circuit Court of Jackson County, Missouri, was not less than $300,000 worth; that the property at the time was deeded to the National Bank of Commerce of Kansas City, Missouri, to secure an indebtedness to that bank. That in the Harris suit, execution was levied on affiant's interest in the property. That the amount due the National Bank of Commerce was $225,000. Affiant lived thirty-two (32) years in Kansas City and knows the value of property there. The property was sold to E. A. Krauthoff, of the firm of Karnes, New & Krauthoff, who were attorneys for the plaintiff Harris; that the notes given by affiant to Hutchings, Sealy, in settlement of the causes of action have never been returned to affiant, or cancelled in any way; but, were sued on in Kansas City, Missouri, and judgment rendered upon them against affiant.

106 *Plaintiffs' Evidence in Rebuttal.*

E. A. KRAUTHOFF testified that he is a member of the firm of attorneys of New & Krauthoff at Kansas City, and was employed by the plaintiffs to represent them, and continuously represented them since June or July, 1900. The stipulation signed by the witness refers to the real estate bid in by the witness at a sheriff's sale on an execution issued in the case of Harris v. Davidson. Affiant never received the $2,000 mentioned in the stipulation, nor was a quitclaim deed ever executed. The land sold in the case of Harris v. J. K. Davidson, was the land referred to in the stipulation.

Cross-examination:

There was a suit brought in the Circuit Court of Jackson County, Missouri, against the Missouri, Kansas & Texas Railway Company, on the causes of action herein, which was removed to the Federal court at Kansas City and was dismissed. It was brought about the year 1900. After this action was begun, suit was instituted in Kansas. After that, the causes of action sued on in this suit were
107 assigned to Mr. Harris by the instrument attached to the deposition of John Sealy. There was no other assignment or consideration of assignment. These same causes of action were assigned to Mr. Harris and suit brought in the Circuit Court of Jackson County, Missouri, against the Missouri, Kansas & Texas Railway Company; then Mr. Harris sued Davidson on these notes and judgment was obtained. Then a suit was instituted to enforce that judgment against the land that was levied upon in the Harris case. This first suit to recover the land had several claimants—Hutchings, Sealy & Company, Fred M. Harris, the witness E. A. Krauthoff and Mr. New. The value of the real estate involved in that action was largely in excess of the judgment,—I think in excess of $100,000. This suit to recover the land is now pending on appeal in the Supreme Court of Missouri. Mr. New has whatever title E. A. Krauthoff acquired by purchase at sheriff's sale. Krauthoff transferred it to New. This property is available in payment of any judgment in behalf of Fred M. Harris v. Davidson. Witness bought the title in a representative capacity. Whatever title was acquired was acquired for Hutchings, Sealy & Company. Another suit on these causes of action was brought against Mr. Davidson in the City of St. Louis. This was dismissed without trial.

108 The defendant further introduced the stipulation entered into in the case of Hutchings, Sealy & Company v. Missouri, Kansas & Texas Railway Company, pending in the Circuit Court of Jackson County, Missouri, at Kansas City, in words and figures as substantially as Exhibit B and C attached to plaintiff's amended petition herein.

JOHN SEALY testified that the account of J. K. Davidson was closed with the plaintiffs by payment of forty per cent. cash and the execution of four notes. This account was closed October 12, 1900. On the daily balance on affiant's books against J. K. Davidson, interest was figured at eight per cent. competed at the end each month and charged against Davidson. Drafts made in Kansas City on the 13th could not reach Galveston before the 15th. Davidson drew on Hutchings, Sealy & Company drafts on the basis of sixty-four (64) cents per bushel for wheat.

J. K. DAVIDSON testified that wheat advanced from seventy (70) cents per bushel in June, to ninety (90) cents during the summer, and when wheat was at the highest price, affiant wired plaintiff several times and wrote them to sell the wheat for his account. Affiant protested at all times on an allowance of only seventy (70) cents per bushel for the wheat; it was worth much more.

109 It does not appear, and there is no evidence, that said J. K. Davidson is, or was, insolvent and unable to respond to the demands of the creditors; and it does not appear, and there is no evidence, that with reasonable diligence the plaintiffs could not have collected, and could not now collect, the amount of their claims from said J. K. Davidson.

There is no evidence to show that the defendant, or any of its officers, agents or employes outside of the office of F. A. Leland, knew or had notice of any custom to receipt for car load shipments of wheat on the certificate or representation of J. K. Davidson & Company, or any one in his office, that such car was loaded with wheat and in possession of the defendant.

Findings of Fact and Conclusions of Law.

The court thereupon made special findings of fact and conclusions of law herein, which findings of fact and conclusions of law, omitting caption, are in words and figures as follows, to-wit:

110 The Court having heretofore heard the evidence herein by the respective parties, and having taken the case under advisement, in order to give counsel on the respective sides an opportunity to prepare and present their briefs of authorities and written argument, and having examined the briefs and argument offered by the respective counsel, and being now fully advised in the premises, at the request of the defendant, the court makes the following findings of fact and conclusions of law, to-wit:

1. That during the month of June A. D. 1900 and for some years prior thereto, one J. K. Davidson, doing business under the name of J. K. Davidson and Company, was engaged in the business of buying, selling and shipping grain, into and out of the city of Kansas City, in the state of Missouri.

2. That said J. K. Davidson and Company also conducted a grain elevator known as "The Union Elevator" and located in the yards used by the defendant railway company in Kansas City, Missouri.

3. A large portion of the business so carried on by said J. K. Davidson and Company was in shipping grain over the defendant's line of railroad from Kansas City in the state of Missouri, to the city of Galveston, in the state of Texas, for export.

111 4. That one, F. A. Leland was, during the month of June 1900, and for some time prior thereto had been, the assistant general freight agent of the defendant company, with office and headquarters in the exchange building, in the city of Kansas City, in the state of Missouri, his principal duties were to solicit freight for the defendant railroad, but when freight was offered after solici-ation or otherwise, he had authority from the defendant company to issue bills of lading for it at Kansas City, Missouri.

5. It had, for some years prior to, and during the month of June 1900, been, the custom of the defendant's assistant General Freight Agent at Kansas City, Missouri, to accept from said J. K. Davidson and company, a certificate from the Union Elevator to the effect that certain grain had been loaded on board cars of the defendant for shipment to Galveston, Texas, and upon receipt of such certificate and without any actual knowledge of the loading of such grain upon said cars, by any agent representing the defendant, *siad* Assistant General Freight Agent would issue what is known as "Shippers' Order" bills of lading for the grain shown by such certificates to have been loaded and then on board of the cars.

112 6. That on the 13th, 14th, 15th and 16th days of June A. D. 1900, said Assistant General Freight Agent F. A. Leland, by and through a clerk in his office in Kansas City, Missouri, who was authorized so to do, issued twenty seven of said shippers' order bills of lading representing in the aggregate 29,100 bushels of wheat, being nine cars of 66,000 pounds each, in weight, and eighteen cars of 64,000 pounds each in weight, and then delivered each and all of said twenty seven bills of lading to said J. K. Davidson and Company, which last named company duly endorsed the same and each of said bills of lading, attached drafts thereto, in amount equalling sixty cents per bushel or a total or aggregate amount of $17,460.00 and said J. K. Davidson received credit for that amount in his account at the National Bank of Commerce in Kansas City, Missouri, and when said twenty seven bills of lading with drafts attached were presented to the plaintiffs in this case, they honored and paid the same in the aggregate sum of $17,460.00.

7. Said twenty seven bills of lading were so issued by such clerk upon certificates made by the said Union Elevator Company and certifying that such cars were loaded with wheat and then on the track of the defendant, and contained the amount of wheat stated in

113 said bills of lading, and without any personal investigation whatever by such clerk or any other agent of the defendant, as to whether or not such grain had in fact been loaded in said cars, and in fact such wheat never was loaded in said cars nor was any of it loaded on any of said cars, and all the wheat shown by each and all of said twenty seven bills of lading to have been received in good condition by the defendant, was in fact never received by it, nor by any

one for it, nor was any part thereof received by it, either before or after issuing such bills of lading.

8. After issuing said twenty seven bills of lading as stated in findings number seven, and on the 20th day of June, 1900 the defendant by its agent F. A. Leland notified the plaintiffs by wire that on all of said twenty seven cars for which bills of lading had been issued, excepting cars numbered 11520 and 11748, the same and each of them had been improperly and fraudulently obtained and that the defendant would not honor the same nor any of them, and on the 21st day of June A. D. 1900, a similar notice was wired to plaintiffs concerning said cars numbered 11520 and 11748.

9. On the 21st day of June A. D. 1900 the plaintiffs in answer to defendant's notice by wire that bills of lading would not be honored and that they had been improperly and fraudulently obtained,
114 wired said F. A. Leland as assistant General Freight Agent of the defendant, that they had acquired each and all of said bills of lading for value, and without notice, and demanded prompt delivery of the wheat, and further that they would hold the defendant liable for delay or failure in delivery.

10. None of the twenty seven cars of wheat for which bills of lading were issued, were ever received by the defendant or by any one for it, and none of them were ever delivered by the defendant to the plaintiffs at Galveston, Texas, or elsewhere.

11. That prior to the issuance of the bills of lading in question in this case, said J. K. Davidson and company had shipped thirty three cars of wheat to plaintiffs at Galveston, Texas, which at the date of the issuance of said twenty seven bills of ladings, was being held by plaintiffs at said city, and upon which said plaintiffs had made advancements to said J. K. Davidson and Company, that during the month of July 1900 plaintiffs sold said thrity three cars of wheat upon the market at Galveston, Texas, at and for the price of 70 cents *seventy cents* per bushel, which sum was the fair and reasonable market value therefor, and there was no time between the middle
115 of June and the first of October 1900 when a better price could have been obtained for said wheat in the Galveston market, and from the proceeds of such sale the plaintiffs reimbursed themselves to the amount of advancements made to said J. K. Davidson, expenses of storage, insurance, etc., and having a balance in their hands from such sale of wheat in the sum of $1,406.95 belonging to said J. K. Davidson and Company applied the same upon the account sued upon herein, leaving a balance due them at that time upon said account in the sum of $16,053.05.

12. Thereafter and on the 6th day of October 1900, plaintiffs and said J. K. Davidson and Company had a settlement of their accounts at the city of St. Louis, in the state of Missouri, and then and there agreed upon the amount then due to plaintiffs because of the failure of delivery of said twenty seven cars of wheat, and the terms of said settlement was based upon the amount advanced by plaintiffs on said wheat, or the bills of lading representing the same, viz., sixty (60c) per bushel and 29,100 bushels of wheat as shown by said bills of lading representing a total valuation of $17,460.00 less said credit

of $1,406.95 leaving a balance in the sum of $16,053.05 then due and owing to the plaintiffs of which sum the said J. K. Davidson then and there paid the sum of $6,421.20 or forty per cent of the
116 total amount then agreed to be due, and on the same date said J. K. Davidson executed his four certain negotiable promissory notes in the sum of $2,407.95 each, bearing date October 6th, 1900 and payable in six, twelve, eighteen and twenty-four months after date, respectively, and drawing interest at the rate of six per cent per annum from date, and delivered the same to plaintiffs. That the first two of said notes together with all interest thereon were thereafter paid in full by said J. K. Davidson making a total payment after date of settlement in the sum of $11,237.10 which deducted from the amount due upon the date of settlement, to-wit: $16,053.05 left a balance due plaintiffs in the sum of $4,815.95 representing the sum due on the last two notes which have never been paid.

13. That this action was filed in this court on the 29th day of March A. D. 1905, and that -he defendant herein then became, and ever since said date has been, informed of the amount of damages claimed by plaintiffs against it because of the failure to deliver said twenty seven cars of wheat.

14. That on the 23rd day of May 1908, there was due plaintiff for and on account of interest on said sum of $4,815.95 the sum of $910.20 and on that date there was collected from said J. K. Davidson the sum of $25.00 on execution in the case of Fred M.
117 Harris against J. K. Davidson, leaving a balance due for and on account of interest the sum of $885.20 on said date. On the 14th day of November 1906 there was due plaintiffs on account of interest on said principal sum the sum of $1,017.63 on which date there was collected on execution from said J. K. Davidson the sum of $275.00 leaving a balance due on account of interest in the sum of $742.63 on said last mentioned date, and on the 9th day of July 1909, there was due as interest on said principal sum the sum of $931.24 on which date there was collected from said Davidson by garnishment proceedings the sum of $475.00 leaving a balance due on account of interest in the sum of $456.24 on said 9th day of July 1909. That interest accrued on said principal sum from the 9th day of July 1909 down to and including the 4th day of November 1914 aggregating the sum of $1,248.10 which in addition to the interest due down to and including the 9th day of July 1909 being the sum of $456.24 makes the total or aggregate sum of $1,704.34 due as interest and for principal and interest a total of the sum of $6,520.29.

15. Both the original claim for damages against the defendant and the two unpaid notes of J. K. Davidson were assigned by the plaintiffs to Fred M. Harris, yet such assignments and each
118 and both of them, were made for the purpose of collection, only, were without consideration and in fact remained the property of plaintiffs and at all times remained their property, and the same have been so treated by all parties to this suit, and credits have been and are claimed by the defendant because of money's collected in a suit instituted by the assignee Fred M. Harris, in Jackson County, Missouri.

16. The sum of $6,421.20 paid in cash and the four notes given plaintiffs by J. K. Davidson in the sum of $2,407.95 each, were not received and accepted by plaintiffs in payment of the full amount due them on account, but was received by them under an express contract or stipulation between themselves and the defendant, providing in substance that when said four notes should be paid in full, then the action pending against the defendant and in favor of the plaintiffs, should be dismissed at the costs of the plaintiffs, but if such notes or any of them should not be paid in full together with interest thereon, but default should be made thereon, or on either of them by said Davidson, then and in that event the plaintiffs should have the right to proceed against the defendant in said cause and prosecute the same to a final determination, and in no event should the acceptance of said four notes from Davidson in any way prejudice
119 the right of the plaintiffs to proceed against the defendant, and substantially the same agreement was entered into between plaintiffs and defendant with reference to extensions of time for payment on the last two of said notes.

Conclusions of Law.

From the above findings of fact the court concludes as matters of law:

1. That plaintiffs are entitled to judgment in their favor and against the defendant on account of principal the sum of $4,815.95.

2. That plaintiffs are entitled to judgment in their favor and against the defendant on account of interest on said principal sum an amount equal to the sum of $1,704.34.

3. That plaintiffs are entitled to a judgment against the defendant in total or aggregate sum for both principal and interest in the sum of $6,520.29 with interest thereon from this date at the rate of six per cent per annum, and costs of suit.

ELMER C. CLARK, *Judge.*

120 Dated this 4th day of November, 1914.

There was no evidence to sustain findings No-. 6, 11, 13, 14, 15 and 16 made by the court herein.

Motion for Additional Findings of Fact.

Thereupon and in due time, on the 6th day of November, 1914, said defendant filed a motion in said action, requesting the court to make additional findings of fact, which motion, omitting caption and signatures of attorneys, is as follows, to-wit:

Comes now the defendant and requests the court to make additional findings of fact in the above case, on the following questions, to-wit:

1. Price of wheat described in the bills of lading at the point of shipment at the time said shipments described in plaintiffs' petition originated.

121 2. What disposition was made by plaintiffs of the two (2) notes executed by Davidson to the plaintiffs and which were assigned to F. M. Harris; what litigation arose on the same; the result of the litigation; the result of the writs of execution issued; the value of the property levied upon and sold; the present holder of the title of said property under the execution, and in what capacity does said present holder hold the title, and what litigation has arisen over the title of said property since the execution sale, and between what parties.

3. In what department of the defendant was said F. A. Leland employed, and who were superior to the said F. A. Leland in point of control.

4. With reference to the agreement mentioned in Finding No. 12 of the Court's findings herein: Was said settlement made in connection with a certain action then pending between the plaintiffs and defendants, and if so, by stating the purpose of said stipulation and the result or disposition of that suit.

5. Was it possible by exercise of reasonable diligence for the plaintiffs to recover of and from the said J. K. Davidson the amount sued on herein; and whether J. K. Davidson could, at any time since June 1900, have been compelled to respond to a judgment on his indebtedness to the plaintiffs.

122 *Motion for New Trial.*

Thereupon, and on November 6, 1914, said defendant filed its motion for a new trial herein, which motion, omitting caption and signatures of attorneys, is as follows, to-wit:

Comes now the defendant Missouri, Kansas & Texas Railway Company, and moves the court to vacate and set aside the verdict and findings of the jury herein and to grant defendant a new trial, for the following reasons, to-wit:

1. Abuse of discretion of the court, misconduct of the plaintiff, accident and surprise which ordinary prudence could not have guarded against, whereby defendant was not afforded a reasonable opportunity to present its evidence and be heard on the merits of the case.

2. Erroneous rulings of the court.

3. The verdict, report and decision are not in accordance with the law.

123 4. The verdict, report and decision are contrary to the evidence.

5. Newly discovered evidence material for the defendant, which it could not with reasonable diligence, have discovered and produced at the trial.

On January 7, 1915, motion asking the court to make additional findings, and motion for new trial, were each overruled by the court, to which ruling of the court the defendant at time duly excepted.

Judgment.

Thereupon the court rendered judgment against the defendant in the sum of $6,520.29, to which the defendant duly excepted.

Specifications of Error.

1. The court below erred in admitting incompetent, irrelevant and immaterial evidence on the trial of said case over the objection of the defendant.

124 2. The court below erred in refusing to sustain defendant's motion to set aside findings numbered 6, 11, 13, 14, 15 and 16, made by the court herein, on the ground that each of said findings was not sustained by any evidence.

3. The court below erred in overruling defendant's motion and request to make additional findings of fact herein, which additional findings so requested are set out in this abstract.

4. The court below erred in overruling defendant's motion for a new trial herein.

5. The court below erred in rendering judgment against the defendant for an excessive amount.

6. The court below erred in rendering judgment against the defendant.

The foregoing is submitted as a full, true and correct abstract of the record in this case so far as is necessary to properly show the questions presented for review.

W. W. BROWN,
JAMES W. REID,
Attorneys for Appellant.

125 Afterwards, on the 12th day of February, 1916, there was filed in the office of the clerk of the Supreme Court of the State of Kansas, a counter abstract of the record, prepared by the appellee, which counter abstract of the record is in the words and figures as follows, to-wit:

126 Filed Feb. 12, 1916. D. A. Valentine, Clerk Supreme Court.

19918.

In the Supreme Court of the State of Kansas.

No. 19918.

JOHN SEALY et al., Partners as Hutchings, Sealy & Co., Appellees,

vs.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Appellant.

Appeal from Labette County, Hon. Elmer C. Clark, Judge.

Abstract of Appellees.

New, Miller, Camack & Winger, of Kansas City, Missouri; F. M. Harris, of Ottawa, Kansas, Attorneys for Appellees.

127 In the Supreme Court of the State of Kansas.

No. 19918.

HUTCHINS-SEALY, Appellee,

vs.

M., K. & T. RY. CO., Appellant.

Appeal from Labette County, Hon. Elmer C. Clark, Judge.

Abstract of Appellees.

The appellees regret that they find it necessary to question the correctness of the abstract offered by the appellant. They believe, however, that so far as such abstract refers to the testimony which was offered in the case it does not properly and fully present such testimony. For that reason they now offer a supplemental abstract.

Of the 27 bills of lading in question, nine of them call for 66,000 pounds of wheat each, and the remaining eighteen call for
128 64,000 pounds of wheat each, making a total of 1,646,000 pounds of wheat or 27,433⅓ bushels of wheat.

F. A. LELAND testified on behalf of the plaintiff that from sometime in 1896 until sometime after June, 1900, he was the assistant general freight agent of The M. K. & T. Ry. Company at Kansas City, Missouri. His office was in the Exchange building, and he was the chief officer of The Railway Company at Kansas City with reference to the solicitation of freight and that his duties at the time in

question included the issuing of bills of lading. In June, 1900, J. K. Davidson was a large shipper of grain over the defendant railway company's lines and a greater part of his shipments were of grain to Galveston for export. He was connected with The Union Elevator Company which owned the elevator located upon the tracks in the railway yards used jointly by the M. K. & T. Ry. Co. and The Frisco Company. Mr. Leland identified the 27 bills of lading which are in question in this case and stated that they were all issued and signed by a clerk in his office and that at that time it was the custom in that office for this particular clerk to issue bills of lading. It was the custom in the office of The Railway Company over which he had charge to issue bills of lading when the elevator from which the grain was loaded into the cars was located in the M. K. & T. Ry. Company's yard, and when the bills of lading were presented to the Company accompanied by certificates from the elevator company certifying that on that date the cars had been loaded and contained a certain specified weight of grain in each car. These bills of lading in question were issued upon the basis of the certificates of the Union Elevator Company that the cars had been loaded the same as
129 the method employed in hundreds of other cases of the same kind and followed a custom which prevailed when Mr. Leland went to Kansas City in 1896, and which had not been changed up until the time in question. The letters "SO" and "NFY" mean "Shippers Order," "Notify," and is the mark to which reference is made in the red stamp upon the bills of lading which says, "Not negotiable, unless shipment be consigned to shipper's order." These letters have a well known meaning to persons engaged in the shipping and railway business. Mr. Leland is familiar with the signature of J. K. Davidson & Company, and the written words "J. K. Davidson & Company" upon the back of each of the bills of lading is the signature of that company. Mr. Leland knew that it was the custom of men in the grain shipping business to attach drafts to bills of lading and secure money upon them, and that this is the only way in which the business can be conducted. It would take a car of grain from one to four weeks to go to Galveston and by financing the grain while it is in transit the shipper could realize upon it at once. The officials of The M. K. & T. Ry. Company knew that this was the custom. The man who signed these bills of lading was employed for the purpose and it was one part of his duties to do as was done here. Revenue stamps upon the bills of lading were cancelled at Mr. Leland's office. The clerk in his office who signed these bills of lading was authorized to issue them upon the delivery to him of the receipts of The Union Elevator Company stating that they had that day loaded these particular cars with a certain quantity of wheat, and that it was not customary when these certificates were received to make any kind of an investigation concerning the matter.
130 These bills of lading were issued in the regular routine of the office business and just the same as a large number of other bills of lading had been issued during the years previous to that time.

The other lines issued their bills of lading in the offices in the Exchange building, and the custom had come up of issuing them in

the up town office and his was the regular office for issuing bills of lading for the shipment of grain. His office had issued many bills of lading under exactly the same circumstances as here and the wheat was ready when the engine came for it, and they had no cause for suspicion in this case. There is everything to indicate that these bills of lading were issued in the regular course of business. The various stamps are upon them, the rate is inserted and the signature just like the signature on other bills of lading issued at that time by that clerk. Practically 90 or 95% of all the bills of lading covering shipment of grain over the M. K. & T. Railroad from Kansas City were issued from Mr. Leland's office. As to matters of ordinary course of the business Mr. Leland did not consult his superior officers. The following are extracts from Mr. Leland's evidence:

"Q. You state, Mr. Leland that your office was primarily for the solicitation of freight business?

A. Yes, sir.

Q. I will ask you if it was not your duty after you had secured the business from them to issue bills of lading and to generally represent the railroad company in that district with reference to freight matters?

Mr. Brown: We object to this as calling for a conclusion and leading.

A. Our duties were primarily that of solicitation. Of course, it would not be good solicitation for us to refuse to issue bills of lading to grain shippers located in that building, and compel these shippers to go down in the bottoms and get their bills of lading when
131 other roads bidding for the same business had their offices there and were ready to issue bills of lading.

Q. Practically all of the bills of lading issued for grain were issued in your office?

A. Yes, sir, practically 90 or 95% of all the bills of lading that we issued in our office on grain shipments.

Q. You say you reported to the General Agent in St. Louis, Mr. Drew? And Mr. Haile? Did you consult with them as to matters arising in the regular course of your business in the office?

A. Yes, sir, when matters arose when I thought they needed consulting, or when in our solicitation we ran into problems that passed beyond my jurisdiction.

Q. But as to matters in the ordinary course of the office business, isn't it a fact that you went ahead and attended to that without consulting?

A. To a very large extent, yes, sir.

Q. Did these gentlemen know of the custom of your office to issue bills of lading upon these elevator receipts?

A. I think they did.

Q. It had been done for a number of years?

A. Yes, sir, it was the custom when I went there.

Q. The clerks in your office had authority to sign bills of lading

for the company upon the delivery to them of these elevator receipts, just as was done in this case?

A. Yes, sir, when the elevator was located in our yards.

(Page- 38-39 of Mr. Leland's deposition.)

Q. You say in answer to one of Mr. Brown's questions that you nor the clerk had any authority to issue bills of lading when the goods had not actually been delivered but you did have authority and it was the custom to issue them upon these certificates from the elevator in your yards?

A. Yes, sir.

Q. No investigation of any kind was made other than the receipt of the certificates?

A. No, sir.

(Page 40 of Mr. Leland's deposition.)

Q. You say you had authority to issue bills of lading on the certificate of the Union Elevator Company—was that on direct authority from Mr. Haile or from Mr. Drew?

132 A. The authority was simply the authority that was there in the office when I went there and continued.

Q. Some written authority?

A. I don't recall whether there was any written authority or not.

Q. It was simply the method of doing business that you continued?

A. It was simply the custom of doing that particular business that I found when I went there and it was continued.

Q. You don't know how long it existed before that time?

A. No, sir.

Q. You have no recollection of any direct authority from any of your superiors to continue that sort of business?

A. No, sir.

Q. Do you know whether your superiors knew of this custom you speak of?

A. My impression is that they knew that was the custom in Kansas City.

Q. From what source do you gain that impression?

A. From the fact it was proper to tell them about matters of that kind that affected our business over there. I don't recall any definite correspondence about it, but my impression now is that they knew in a general way about what the methods were in Kansas City in handling our grain business."

(Page- 45-46 Mr. Leland's deposition.)

JOHN SEALY, one of the plaintiffs, testified in substance that the firm Hutchings-Sealy & Company, the plaintiffs, was a partnership and detailed the nature of its organization. For considerable time before June, 1900, the plaintiffs had been transacting business with J. K. Davidson & Company. Davidson & Company would draw a draft through The National Bank of Commerce of Kansas City, upon the plaintiffs for a certain amount, and attach to the draft bills of lading specifying that a certain amount of bulk wheat had been

shipped to Galveston in a certain car. These bills of lading
133 would in each case represent sufficient wheat to aggregate the amount of the draft to which they were attached, figuring the wheat upon a basis of .64c a bushel. When these drafts with the bills of lading attached would be received by the plaintiffs, they were honored for the amount. When the grain was received and sold by Mr. Davidson or for him, the amounts received from sale would be credited to the Davidson account, and the plaintiffs thus reimbursed. In June, 1900, the plaintiffs honored drafts covering 27 cars of wheat, which wheat was never received in Galveston. This transaction was carried on in the usual way and attached to the drafts which the plaintiffs paid, were bills of lading, regularly issued by the M. K. & T. Ry. Co., covering such 27 cars of grain; upon the faith of these bills of lading, the plaintiffs advanced to Davidson & Company .64c a bushel. After this money had been advanced the plaintiffs received a telegram from F. A. Leland, Assistant General Freight Agent of the M. K. & T. Railway Company, notifying the plaintiffs that the bills of lading covering these 27 cars had been improperly obtained and that the company would not honor them. The plaintiffs at once wired Mr. Davidson of the receipt of the telegram from Mr. Leland, and Mr. Davidson replied that there had been no fraudulent issue of the bills of lading, that the bills were issued by the railway in its customary and usual way, and that it must respond to the plaintiffs; that the burning of his elevator and grain had complicated a situation leaving possibly outstanding some bills for grain not in possession of the railway company; that he hoped to work everything out satisfactory, and that the railroad company owed him enough to make good upon any loss it might sustain from a possible shortage.
134 The plaintiffs endeavored to collect from Davidson & Company the amounts of the advancement which they had made against these 27 cars, but were not successful, in doing so. At about the same time of the issue of these bills of lading in question, there were 33 other cars of grain shipped to the plaintiffs from Davidson. This grain was sold by the plaintiffs to a Mr. Newing for $25,347.70 which amount was credited to Mr. Davidson's account upon August 1st, 1900. A statement of Mr. Davidson's account has been prepared by Mr. Sealy, which is the account shown upon pages 86 and 87 of the abstract of the appellant. This statement shows a balance due from Davidson to the plaintiffs of $16,053.05.

Referring to this account Mr. Sealy stated that the statement showed a balance against Mr. Davidson upon June 1st, 1900, of $110,103.18 and credits to him on the same date of $37,955.00 and of $9,987.50. The items of money upon the debit side of this account represent the amount of drafts with bills of lading attached, drawn by Davidson & Company upon the plaintiff, and paid by them. The figures upon this debit side of the account commencing with 9,887 represents the number upon each of these drafts. This account shows a balance against Mr. Davidson upon June 20th, of $41,044.34. The item upon the debit side under the date of June 20th, "Int. to date $117.18" was interest which was charged to Mr. Davidson's account upon June 20th, 1900. The item "Charles R. Brown $31.80"

under date of July 3rd was for a premium upon insurance upon the grain. On July 13th Mr. Davidson was given credit for $120.00 returned premium upon grain as shown by the credit entry of
135 that date. The item "Grain inspector $11.55" under date of July 10th was the amount paid by the plaintiffs for the inspection of this grain. Two items as follows: Karnes N. K.—$100" and "William Ballinger—$47.75" upon the debit side of the account under date of August 2nd represented expenditures in the suits to collect the amount due. These were cancelled by entries upon the credit side of the account under date of October 12th. The item of August 16th, "Ins. grain to Aug. 1st $50.40" was for insurance paid on the grain covered by the 33 cars to the time it was delivered to Mr. Newing. The entry under date of October 12th, "Int. to Aug. 1st $382.66," was interest on the debit balance of Davidson & Company to August 1st, 1900, as stated in this account. The result of this account was the balance stated under the date of October 12th, of $16,053.05.

The form on this account was changed at or about this date by the payment of the forty per cent in cash and the giving of the four notes representing the remaining sixty per cent.

The following is an extract from Mr. Sealy's testimony:

Q. The statement which you have attached to this deposition as "Exhibit A" does not show as items of credit on the Davidson account any payment made on either of those two notes.

A. It does not. That account was closed by the payment of forty per cent in cash and by the four notes aggregating nine thousand six hundred and thirty-one dollars and eighty-three cents.

Q. And that account was closed on October 12th, 1900?

A. Yes, sir, I presume so. That running account was closed by this credit and those bills receivable were put in the Bills Receivable Ledger of Hutchings-Sealy & Co., and two of them paid and two not."

(Pg. 27 of Mr. Sealy's deposition.)

136 Judgment has been recovered upon the last two notes, but the plaintiffs have never been able to collect anything upon them.

Mr. Sealy had never heard that Mr. Davidson objected to the price for which the plaintiffs sold the 33 cars of grain, until he heard that Mr. Davidson did object to it in his testimony, in this case. He never made any objection to Hutchings-Sealy & Company. Hutchings-Sealy & Company did not receive a telegram from Mr. Davidson in September or October, 1900, directing them to sell this grain. The grain was actually sold upon July 6th, 1900, and was delivered and paid for upon August 1st, 1900. Seventy cents per bushel was the highest price which they could secure for this grain. The only amount which Hutchings-Sealy & Company charged against Davidson concerning that grain, were the insurance charges shown in the statement. The plaintiffs notified Davidson upon August 11th, 1900, that they had sold the 33 cars of wheat to Mr. Newing at seventy (70) cents a bushel, and again wrote him on August 20th, 1900,

that they had sold the wheat and that it had been delivered on August 1st.

On June 20th and 21st, 1900, the plaintiffs and defendant Railway Company through their proper representatives exchanged telegrams concerning the bills of lading in question. These telegrams were offered in evidence in the testimony of Mr. Sealy, and are the same as those shown in the reply of the plaintiffs herein and appear upon pages 46, 47, 48 and 49 of the abstract of the appellant.

EDWARD F. NEWING testified that he was a grain exporter in Galveston in the summer of 1900; that in July of that year he purchased from Hutchings-Sealy & Company 36,211 bushels of
137 wheat and paid them .70c a bushel for it. This was wheat which J. K. Davidson had shipped to Galveston. Mr. Newing is familiar with the price of wheat during the summer of 1900. The wheat which he purchased from Hutchings-Sealy & Company in June could not have been sold on the market at Galveston at any time between the 1st of June and the last of October, 1900, for more than seventy (70c) cents a bushel.

R. WAVERLY SMITH testified that during the year 1900 he was an attorney and a member of the firm of Terry, Ballinger, Smith and Lee, which firm attended to the business of the plaintiffs. The witness advised with Hutchings-Sealy & Company concerning the transaction involved in this litigation, and this claim was placed in the hands of his firm for collection, and it was then sent to the firm of Karnes, New and Krauthoff of Kansas City. These two firms worked together in their effort to collect the claim from Davidson & Company, but were not successful. Not being able to collect the claim from Davidson, Hutchings-Sealy & Company sold the 33 cars of wheat which have been mentioned and applied the proceeds to the account of Mr. Davidson. After this sale Mr. Smith went to St. Louis and took the matter up with Mr. Davidson, with reference to the balance on the claim which was then due. A meeting was held between Mr. Smith, Mr. Davidson and James Hagerman, General Counsel of the M. K. T. Ry. Company and Mr. Chester Haile, who was at that time the Traffic Manager of the M. K. & T. Ry. Company. At this meeting the correctness of the balance of something over $16,000.00 which the plaintiffs claimed was not questioned in any
way, and Mr. Davidson did not claim or suggest that he had
138 instructed Hutchings-Sealy & Company to dispose of 33 cars of grain, and that they had disobeyed his instructions, and held them until the price of the grain became lower. At this meeting the arrangement was made whereby forty per cent (40%) of the claim was paid in cash, and sixty per cent (60%) was represented by notes. It was agreed between Mr. Smith representing Hutchings-Sealy & Company and the gentleman representing the Railway Company, that the adjustment then made was without prejudice to the rights of Hutchings-Sealy & Company which they might have against the M. K. & T. Railway Company based upon the issuance of bills of lading for cars of grain that were never received. Mr. Smith discussed the question of the liabilities of the Railway Company with

Mr. Hagerman, the General Counsel of the Company, and it was a matter not determined either one way or the other, because it was understood that the adjustment as affected was not to prejudice any claim which the plaintiffs might have against the Railway Company.

G. F. DEWAR testified that he was Superintendent of the firm of J. K. Davidson and Company, for about four years commencing sometime in 1896 and extending until after the occurrence in question here. In the course of business between the Davidson Company, the plaintiffs and the M. K. & T. Ry. Company, the bills of lading were received from the Railway Company attached to the drafts drawn upon the plaintiffs. The 27 bills of lading in this case were all endorsed upon the back with the signature "J. K. Davidson & Company." This endorsement was made by Mr. Dewar as the representative of Davidson & Company.

J. K. DAVIDSON testified that in 1900 he resided in Kansas City, Missouri, and was engaged in the Elevator and Export Grain
139 business, and was the sole proprietor of the firm of J. K. Davidson & Company, and transacted a large amount of business with the plaintiffs in the method described by the other witnesses. He dealt principally in Number 2 hard wheat with occasionally a few loads of Number 3 hard wheat. He gave the plaintiffs notes for $2,407.95 each as mentioned by the other witnesses and paid two of them. He claims a suit was brought against him in Texas on one of these notes, but this was later dismissed. Another suit was brought against him in Kansas City. In the suit in Kansas City he entered a counter-claim and concerning this Mr. Davidson testified:

"Q. What was your claim?

A. I claimed that about June 17th the price of wheat in Galveston was about 70c. per bu. f. o. b. steamship; about that time the drouth started in the northwest which prevailed for some time, and wheat advanced from 70c in Chicago to 90c per bu., and when about the top price I wired Hutchings-Sealy & Company to sell out that wheat in order to protect themselves, to which they made no reply, and when the settlement was finally adjusted in September I think, they rendered an account of sales for this wheat at 70c per bu. f. o. b. steamship instead of the price which I claimed they could have sold the wheat for when I instructed them, at not less than 85c per bushel or more."

(Page 10 of Davidson's deposition.)

This is the extent of the testimony of Mr. Davidson upon this subject, and is simply a recital of what he claimed in a counter-claim filed in this suit brought against him. He was not able to find any of the letters or telegrams received or sent. Judgment was rendered against him in Kansas City, in this suit, and his interest in property
was levied upon. At the time the levy was made the property
140 was in the name of the National Bank of Commerce. Mr. Davidson claimed that while the deed which he and his wife made to the National Bank of Commerce was in form a warranty deed, it was in fact made to secure his indebtedness to that bank, and

was made under the verbal condition that the property was to be held in trust for himself and wife, and that they had the privilege to redeem it at any time by paying the indebtedness to the bank. This indebtedness amounted to about $225,000.00. Whatever interest in this property Mr. Davidson had was purchased by Mr. Krauthoff upon the judgment in the Harris case. In Mr. Davidson's suit against the Bank of Commerce, he was defeated in the lower court, and appealed, but the appeal was dismissed. Mr. Davidson understands that the Harris judgment in Kansas City still stands against him. The National Bank of Commerce still holds the property, which Mr. Davidson deeded to them as security for the notes. Mr. Krauthoff did not purchase any property at the sheriff's sale which had not been transferred to the National Bank of Commerce. At the time of his fire in June, 1900, Mr. Davidson owed from $300,000.00 to $325,000.00. In his judgment he valued his assets at $450,000.00 but when he failed he states that this knocked off about fifty per cent of their value. His assets were such as would depreciate on account of his failure. He has paid practically all of his claims except that to the National Bank of Commerce, the Hutchings-Sealy claim and one other.

W. H. FRAZELL testified that he was the chief clerk of the Secretary of the Board of Trade at Kansas City, and that the record of the Board of Trade showed the price of grain in Kansas City in June, 1900. The lowest price for any kind of wheat in Kansas
141 City during June, 1900, was 53c which was for Number 4 hard wheat. This was simply the lowest price of any wheat sold in Kansas City during that month. The record shows a large number of quotations of wheat at that time, at higher prices.

Upon November 4th, 1914, at a hearing of this case the question of the amount of credits or payments which might be made to the plaintiffs by reason of certain other suits, was presented and Mr. F. M. Harris, one of the attorneys for the plaintiffs, made the following statement in open court, relative to this question:

"The two notes executed by J. K. Davidson were assigned to F. M. Harris for collection. A suit was commenced in his name in Jackson County, Missouri, and judgment was rendered in the full amount of both notes and as a result of an execution in that suit we collected at one time $25.00 and at another time we collected $275.00 and at another time $475.00. We then levied upon a considerable tract of real estate which Mr. Davidson had transferred by what appeared to be a warranty deed on its face to some bank in Kansas City, I will say, or some corporation up there, I think the Bank of Commerce, and whatever interest Mr. Davidson had in that real estate was sold to Edwin A. Krauthoff and he transferred whatever interest he took under that sheriff's deed to Mr. Alexander New, both of whom held only as trustees for the plaintiffs in this case and both of whom were attorneys for the plaintiffs. A suit was then commenced in the Circuit Court of Jackson County, Missouri, against the person claiming under the deed to the National

Bank of Commerce to declare that deed a mortgage and the Circuit Court held that it was an absolute conveyance, and that Mr. New took nothing under that deed. There has been an appeal to the Supreme Court of Missouri, and is now pending. The purpose of the litigation is to set aside that conveyance from Mr. Davidson to the National Bank of Commerce, and we have been ready at all times and now are to transfer to the Missouri, Kansas and Texas Railway Company anything which we may gain by this litigation by a proper assignment and of course they pay the necessary
142 expenses of the litigation after the payment of the judgment of the M. K. & T."

Upon pages 81 and 82 of the abstract of the appellant will be found a stipulation to the effect that any decision of the Supreme Court of Missouri or other Appellate Court of Missouri, which any counsel in the case may call to the attention of the Court, and the Supreme Court of the State of Kansas, or any other Court, may be considered as having been offered in evidence. Under this stipulation we now offer in evidence the opinion of the Supreme Court of Missouri, in the case of Hutchings-Sealy & Company against The Terrace Realty & Securities Company, which decision was rendered by the Supreme Court of the State of Missouri, upon August 1st, 1915, and which is reported in Vol. 175 S. W. Report at page 905. This is the case which was brought by the plaintiffs in the effort to realize something upon the judgment rendered in the case of F. M. Harris against J. K. Davidson and in which case execution was issued and certain real estate sold to Mr. E. H. Krauthoff as mentioned in the testimony in this case. The opinion of the Supreme Court of the State of Missouri is as follows:

The evidence to show that a deed absolute on its face was, in fact, a mortgage, must be clear and convincing evidence, excluding every reasonable doubt.

Evidence in an action to declare a deed absolute on its face to have been a mortgage in fact held insufficient to justify a finding that an oral agreement changing the prima facie effect of the writing was made.

The principle, "Once a mortgage, always a mortgage," does not preclude the purchase by the grantee in an absolute deed
143 given as security of the equity of redemption upon reasonable consideration under a fairly made agreement, but such a transfer will not be inferred from mere loose expressions, but must appear by writing importing in terms a transfer of the mortgagor's interest.

Where the consideration paid by the grantees in a deed absolute on its face for a release of the equity of redemption consisted in the release of the grantor's previous indebtedness to them and their agreement to pay 40 per cent of his outside liabilities, some of which were owing to plaintiffs, who assented to the agreement and were paid such 40 per cent by the grantees, taking the grantor's notes for the balance, the motive actuating the parties being to keep the grantor out of bankruptcy, which they believed would reduce the fund available to pay his debts, the fact that the consideration for

the second deed was not fixed and certain did not show that it was intended merely as security, and hence was a mortgage in fact.

When the grantees is a deed absolute on its face as consideration released to the grantor his liabilities to them, and assumed, with the assent of outstanding creditors, the payment of 40 per cent of his liabilities to such creditors, the avoidance of bankruptcy proceedings being one of the principal objects of the parties, such proceedings being impossible, in point of time, after the 1st of March, 1901, the provision in the contract between grantees and grantor, assented to by the outstanding creditors, that grantor's indebtedness to the grantees should be kept alive until such date, and then canceled in case no bankruptcy proceedings had been instituted although amounting to a continuance of the indebtedness
144 beyond the date of the deed to the grantees, December, 1900, nevertheless did not render such deed a mere security, and hence a mortgage in fact, since the contract between the parties merely fixed a time at which the entire transaction should take effect, such time being postponed designedly to a date when it would be impossible for bankruptcy proceedings to intervene.

Where a deed absolute on its face was executed to the grantees in consideration that they release grantor's liabilities to them, etc., his other creditors assenting to the contract, the fact that a note of the grantor to one of the grantees was subsequently used to release certain property from the record lien of a deed of trust previously executed by the grantor to secure such note did not establish the status of the note as an existing indebtedness to show that the deed did not cancel it, together with the grantor's other liabilities to the grantees, so that such deed, though absolute on its face, operated only as security, and hence was a mere mortgage; since, although the general contract between all the parties to the transaction postponed the time of final vesting of title to the grantor's assets to the grantees until March 1, 1901, nevertheless at such date the title did vest, and the note was extinguished under the doctrine of merger, and could not be revived by its mere use to clear the record title of the property.

Appeal from Circuit Court, Jackson County; James H. Slover, Judge.

Action by Sealy Hutchings and others against the Terrace City Realty & Securities Company. Judgment for defendant, and plaintiff's appeal. Affirmed.

145 John Taylor, Charles Edwin Cooley, and New & Krauthoff, all of Kansas City (Terry, Cavin & Mills, of Galveston, Tex., of counsel), for appellants. Robinson & Goodrich, of Kansas City, for respondent.

BLAIR, *J.*:

By this suit in the Jackson circuit court plaintiffs sought to decree that a deed executed by J. K. Davidson and wife, absolute on its face, was in fact a mortgage.

Davidson was in the grain business, and in debt. In January, 1900, he and his wife executed two deeds to W. A. Rule. One, for a recited consideration of $40,000 conveyed all the northeast quarter of the northeast quarter of section 2, township 49, range 33, except two railroad rights of way over it. This tract contained 36.83 acres. The other deed conveyed a one-third interest in block 19, West Kansas addition No. 1, for a recited consideration of $15,000. Both deeds were absolute in form, but, it is agreed, were intended merely to secure indebtedness of Davidson to the National Bank of Commerce of Kansas City (hereinafter called the bank). These deeds were not recorded at once. Davidson soon became more heavily involved, and June 19, 1900, he and his wife executed a trust deed to secure notes aggregating $106,000 representing money due the Bank. The property conveyed consisted of that covered in the two deeds to Rule, and also five elevators and warehouses. On June 25, 1900, the deeds to Rule were recorded. Davidson was also indebted to the Fidelity Trust Company (hereinafter called the Trust Company), and June 19, 1900, executed a trust deed to it securing $20,000, conveying four lots in block 16, Smart's addition No. 3, and lot 20 and the north 20 feet of the south 40 feet of lot
146 17, block 3, Old Town, all in Kansas City, Mo. Soon thereafter Davidson's affairs became still more involved. The Bank and Trust Company discovered that, in addition to his indebtedness to them, he owed other unsecured creditors' sums aggregating $51,747.77. The total he owed the Bank was $235,000, in round numbers, and he owed the Trust Company $65,000.

The record shows that the Bank, the Trust Company, and Davidson desired to avoid proceedings in bankruptcy; it being seemingly conceded the parties believed such proceedings would yield less for the creditors than the method later adopted. After some negotiations, and on October 6, 1900, the Bank and Trust Company and Davidson entered into a written contract, as follows:

"This agreement between the National Bank of Commerce of Kansas City, Missouri, herein called the Bank, first party, the Fidelity Trust Company of Kansas City, Missouri, herein called the Trust Company, second party, and J. K. Davidson & Co., herein called Davidson, third party, witnesseth:

"(1) The Trust Company agrees to cause to be purchased (using or causing to be used, so far as said Bank is concerned, for that purpose portions of the insurance money hereinafter mention-) at 40 cents on the dollar, or less, all the claims against Davidson set forth in the list hereto attached as Exhibit 1, provided it can acquire all at such price.

"(2) The Bank and the Trust Company shall purchase or compromise and settle the claims against Davidson set forth in the list attached as Exhibit 2, for as little money as possible. Said Trust Company shall furnish, of the money required to purchase or compromise and settle said claims a sum equal to 40 per cent. of all of said claims so purchased or compromised, and of the balance of the amount required to purchase or compromise the same the Bank shall furnish seven-twelfths and the Trust Company five twelfths.

"(3) It is also agreed that should there now be claims
147 against Davidson not embraced in the list hereto attached as Exhibit 1, and either the Bank or the Trust Company should deem it advisable to purchase or compromise and settle said claims, then the Bank shall furnish seven-twelfths and the Trust Company five-twelfths of the aggregate amount required to purchase or compromise the said claims provided that the total amount required to purchase or compromise all of said claims shall not exceed the sum of $2,000.00.

"(4) Davidson shall execute to said Bank and said Trust Company severally his notes payable in twelve (12) months, and bearing interest at the rate of six (6%) per cent. per annum from date, for the aggregates of such sums as said Bank and Trust Company may hereafter pay under the clauses hereof, which provide for the payment of seven-twelfths by the Bank, and five-twelfths by the Trust Company.

"(5) Of the assets which the Bank, or any one for it, or the Trust Company, or any one for it, now holds to secure Davidson's indebtedness, the Bank shall be entitled to receive and hold, as its absolute property, the following:

"(*a*) [Here is described in detail the 36.83-acre tract referred to above.]

"(*b*) [Herein was described the property conveyed to Rule by the record deed of January, 1900, as above referred to.]

"(*c*) The property on East Ninth street in Kansas City, Missouri, known as the J. K. Davidson residence.

"(*d*) A certain lot on Walnut street in Kansas City, Missouri, heretofore deeded by C. H. Hodge to J. K. Davidson, and more particularly described as follows. * * *

"(*e*) A certain note given by G. W. Tourtelot and C. H. Hodge to J. K. Davidson, for $4,778.91, which note is now in possession of the Bank.

"(*f*) 857 shares (of the par value of $100.00 per share) of the capital stock of the Union Elevator Company, the certificate for 260 shares of which is now in the possession of the Bank, and the certificates for the remaining $57,000.00 are now in the possession of the Trust Company; but all the rights of the holder to said 857 shares of the capital stock of said elevator Company to par-
148 ticipate in the money paid by insurance companies for loss on its elevator, the claims against railroad companies for causing the elevator fire, and in the salvage from said fire, are surrendered to the Trust Company, and said amount of stock may be used by the Trust Company for the purpose of obtaining a distribution to it of such money and salvage, and the money arising from claims against railroads for causing fire. However, if the Trust Company shall desire to prosecute, in the name of the Union Elevator Company, any suit against any railroad company, it shall indemnify and hold harmless said Elevator Company as to costs, expenses, damage arising from, or in any way connected with, any and all such suits; all other litigation against the Elevator Company shall be under the control of the Bank.

"The Trust Company shall when requested by the Bank, after the distribution aforesaid, but not before, cause the present officers and directors of the said Elevator Company, or such of them as the Bank may require, to resign so that the Bank may elect others in their places.

"(6) The Trust Company shall be entitled to receive and hold as its absolute property all other assets of Davidson's, including all insurance money and salvage from the fire, and damage from railroads, mentioned in the preceding paragraph, and including Parsons, Kansas, elevator, and membership in Chicago Board of Trade.

"(7) Each party hereto shall execute such conveyances and assignments as may be necessary to carry out this plan.

"(8) All claims thus acquired by the Trust Company, including those now owned by the Bank, shall be kept alive and in force as against Davidson until March 1, 1901, and if at that time no proceedings have been begun either by or against Davidson to have him adjudged a bankrupt, and there are then no outstanding claims other than those mentioned in the list hereto attached, then all of said claims shall be canceled and discharged, and Davidson released from liability thereon; but this provision as to canceling claims shall not apply to the claims which may hereafter be purchased or compromised and settled by the Bank and the Trust Company, and for which Davidson is to execute to them his notes, as provided in subdivision 1 of this agreement.

149 "(9) If at any time before March 1, 1901, bankruptcy should be begun by or against him, and said Davidson should be adjudged a bankrupt, and either said Bank or Trust Company should be required to turn over to the trustee in bankruptcy, any property mentioned in this agreement, or the proceeds thereof, or to account in the bankruptcy proceeding for the value of any such property, then this agreement shall be considered null and void, and shall not in any way impair the rights of either party, as they were prior to the execution thereof; but the claims against Davidson which may be hereafter purchased or compromised by said Bank and Trust Company shall be held by them against the bankrupt estate in proportion to the amount paid thereon by each. If, in case of bankruptcy, the estate should pay to the creditors less than 40 per cent. of their claims, then the Bank shall reimburse the Trust Company to the extent of one-half of the loss it may sustain on the claims heretofore purchased by it at 40 cents on the dollar, as recited in the first paragraph of this agreement. In case of bankruptcy, the Bank and Trust Company shall have the right to vote jointly all claims heretofore purchased by the Trust Company, and all such as the Bank and Trust Company may hereafter purchase, and in the event the Bank and Trust Company cannot agree as to how said claims should be voted on any proposition arising in the bankruptcy proceeding, then each shall have the right to vote one-half of all such claims. Neither the Bank nor the Trust Company shall have the benefit of this paragraph if it shall directly or indirectly institute, or cause to be instituted, proceedings to have said Davidson adjudged a bankrupt.

"Out of the amount $4,156.65 to be paid to the D. R. Francis & Bro. Commission Company, and $637.83 to be paid to the M., K. & T. R. R. Co., the Bank shall pay $645.49, this to be considered a part of the $2,000 mentioned in paragraph 3 hereof."

The first of the 37 claims listed in the exhibits attached to the contract was that of Hutchings-Sealy & Co., which forms the basis of this suit, the amount thereof being $16,053. In accordance with the written agreement, the Bank and Trust Company paid to
150 each of the 37 other creditors 40 per cent. of their claims, providing the money therefor. Hutchings-Sealy & Co. refused to assign their claims in full on payment of 40 per cent. thereof, but entered into the following agreement:

"W. A. Rule, Esq., Cashier National Bank of Commerce, Kansas City, Missouri.

"DEAR SIR: Hutchings-Sealy & Co., if consent thereto be indorsed hereon by J. K. Davidson & Co., agree: For their claim of $16,053.00 against Davidson & Co., to accept in cash 40 per cent., or $6,421.20. This cash may be raised between you and the Fidelity Trust Company in any way you see fit, by taking or holding property now or heretofore owned by Davidson & Co., or any member thereof, we waiving all right to object to the transfer of such property or to take any advantage under the bankrupt law on account of any disposition made thereof, hereby assigning $6,421.20 of our claim against Davidson & Co., to you and the Fidelity Trust Company.

"J. K. Davidson is to execute four notes in equal amounts for the remaining 60 per cent. due us, due in six, twelve, eighteen, and twenty-four months respectively, after date, with interest at 6 per cent. per annum upon each note. Default in prompt payment of any one of the notes shall mature all of said notes. So long as there is no default in any note, no proceedings in court can be taken against Davidson and Davidson & Co., and this is all without prejudice to the claim held against the Missouri, Kansas & Texas Railway Company.

"Dated October 6, 1900.

"HUTCHINGS, SEALY & COMPANY,
"By KARNES, NEW & KRAUTHOFF,
"Their Attorneys.

"We consent to above proposition.

"J. K. DAVIDSON & CO.
"J. K. DAVIDSON."

Thereupon they were paid $6,421.20, and Davidson executed to them his notes as agreed, two of which he later paid in full.

December 27, 1900, Davidson and wife, for a recited consideration of $10,000, executed a deed, absolute in form conveying to the Bank all the property described in the deeds executed to Rule in
151 January, 1900, and in the trust deed of June 19, 1900, to the Trust Company; this last being subsequently released by the Trust Company. The 857 shares of stock of the Union Elevator Company were already in the possession of the Bank and Trust Com-

pany, but represented only the real estate of that company; the elevator having burned, and the insurance money having been collected by the Trust Company, as appears from the agreement of October 6, 1900. December 31, 1900, Rule executed to the Bank a quitclaim deed to all the property conveyed to him by Davidson in January, 1900. The Bank and Trust Company complied with the agreement of October 6, 1900, and of the sum contracted to be paid in that instrument paid their respective proportions. The Bank then had apparent title to the four tracts hereinbefore described, except the west half of the four lots in block 16 of Smart's addition No. 3. Thereafter the Bank collected rents and paid taxes on these tracts, exercising the usual acts of ownership.

As stated, Davidson paid two of his notes to Hutchings-Sealy & Co., but defaulted as to the others, though paying interest thereon until October, 1902. He made no demand upon the *the* Bank indicating that he claimed any interest in the tracts he had conveyed to it; in fact, it does not appear he so much as inquired about the property at all. In August, 1903, the then president of the Bank received a letter from a St. Louis lawyer stating that Davidson had submitted to him the agreement of October 6, 1900, between Davidson and the Bank and Trust Company, and that he (the attorney) had advised Davidson that the agreement "is, in effect, a mortgage or pledge of Davidson's assets." The writer protested that he did not ex-
152 pect anything to be done, and would not be disappointed even if he received no answer. The recipient of this letter replied, explicitly stating that Davidson had no interest whatever in the property acquired by the Bank from him, but stating that, if the attorney or any one else would pay the Bank, with interest, what Davidson owed it October 6, 1900, the Bank would convey to such person all property acquired from Davidson, and pay him a bonus of $25,000. No response to this seems to have been made, but May 1, 1904, Davidson commenced a suit against the Bank. The petition recounted the various transactions, deeds, etc., and set out the agreement of October 6, 1900, in full, stated that the deed of December 27, 1900 (herein attached) was executed "for further security for" Davidson's indebtedness to the Bank, and that its execution was "induced * * * by the terms" of the contract of October 6, 1900, and then alleged that "in law and equity the entire transaction * * * constituted a mortgage," and prayed that it be so declared, tendering payment of the indebtedness. There was no allegation of any oral contract that the deed of December 27, 1900, was to be delivered or accepted as a mere security for Davidson's debts and as a mortgage.

Thereafter the Bank went into the hands of a receiver and prior to its reopening the authorities required that the real estate it held, including that acquired from Davidson, be sold before the Bank resumed business. This was in 1908. In the meantime Davidson's suit against the Bank resulted in a judgment for defendant and an appeal by Davidson. Thereupon defendant company was
153 organized and bought the Bank's real estate. Many of defendant's original stockholders were also stockholders in the Bank; they naturally being interested in placing the Bank in a con-

dition to resume business. There were stockholders of defendant, however, who were not interested in the Bank, and there were stockholders in the Bank who took none of defendant's stock. March 25, 1908, the receiver of the Bank, for a consideration of $400,000, conveyed to defendant the realty the Bank had acquired from Davidson and a great many other lots and tracts in Kansas City, Leeds, and in rural Jackson county, and in Kansas and New Mexico.

In 1907 plaintiffs assigned to Fred M. Harris, for collection, Davidson's unpaid notes, and Harris obtained judgment for $6,260.66 against Davidson thereon, October 17, 1907. April 3, 1908, execution was issued on this judgment and levied on the property conveyed to the Bank by Davidson by the deed of December 27, 1900. The (then and now) attorney of plaintiffs bought at the sale, bidding $25. October 21, 1908, another execution on the same judgment was issued and levied on the same land, and at the sale the same attorney bid $275, and the property was struck off to him. Davidson having been unsuccessful in the suit instituted in 1904 against the bank, and having failed to perfect his appeal therein, it was dismissed by this court in April, 1909.

In the case at bar Davidson testified plaintiffs' attorney had agreed that Mrs. Davidson should have about one-third of any amount recovered in the suit; she having lost her dower by reason of the deed of December 27, 1900. He also testified that the president and cashier of the Bank agreed that the contract of October 6,
154 1900, and the deed of December 27, 1900, were to be taken simply to secure his indebtedness, and not as absolute conveyances; that they promised to take care of the property, pay taxes, etc.; and that he was to have a reasonable time to redeem. The president and cashier of the Bank and the attorney who represented Davidson in the negotiations resulting in the agreement of October 6, 1900, testified to the contrary.

In January, 1910, defendant sold the 36.83-acre tract for $171,000, and then discovered that the mortgage (above mentioned) securing the $100,000 note and the two $3,000 notes was unreleased of record. After some difficulty it found these notes in the possession of the attorney who had represented the Bank in the suit against it by the Davidsons in 1904. Securing the notes, the tract sold was released of record and the sale consummated.

Other facts necessary to a decision will be stated in the opinion.

It is contended that the judgment should have been for plaintiffs because: (1) The evidence shows an oral agreement that the deed of December 27, 1900, was to be given and accepted as a mortgage; and (2) that the instruments and deeds on their faces, independent of oral evidence, show the transaction was a mortgage.

[1] I. The deed of December 27, 1900, "is absolute on its face, and to destroy the presumption arising therefrom that it is and was, as it purports to be, absolute in fact, it is necessary that the evidence adduced to prove it to be a mortgage be clear and convincing and exclude every reasonable doubt." Rinkel v. Lubke, 246 Mo. loc. cit. 387, 388, 152 S. W. 81, 84, and cases cited.

[2] Davidson's testimony was sufficient, if true, to support
155 a finding that there was an oral agreement the deed to the Bank was to be, and was, executed as a mere security or mortgage. He was contradicted by practically every other participant in the transaction and supported by none. His silence during 1901, 1902 and 1903, when added to the fact he did not make any claim upon the Bank prior to the letter his St. Louis attorney wrote, and to the further fact that his attorney did not intimate he (Davidson) claimed an oral agreement existed, and the further fact that the petition in the suit Davidson brought in 1904 was grounded solely upon a construction of the deed and contract, and did not set up an oral agreement at all, makes it clear that the trial court, under the rule stated above, was justified in finding no oral agreement had been made.

[3] II. The deeds executed in January, 1900, were absolute in form, but are conceded to have been intended to secure Davidson's indebtedness to the Bank, and consequently were, in fact, mortgages. Wilson v. Drumrite, 21 Mo. loc. cit. 328. "Once a mortgage, always a mortgage" is a maxim this court many times has applied. Sheppard v. Wagner, 240 Mo. loc. cit. 433, 114 S. W. 394, 145 S. W. 420. This principle does not, however, preclude the purchase of an equity of redemption by the mortgagee provided the new agreement be upon a consideration which "would be deemed reasonable if the transaction were between other parties. The transaction must in all respects be fair, with no unconscientious advantage taken by the mortgagee." Lipscomb v. Talbott, 243 Mo. loc. cit. 33, 147 S. W. 798, 807, citing Jones on Mortgages (6th Ed.) § 340. The same decision quotes from the same author the rule that a
156 release of the equity to the mortgagee "will not be inferred from equivocal circumstances and loose expressions. It must appear by a writing importing in terms a transfer of the mortgagor's interest, or such facts must be shown as will estop him afterward to assert any interest."

[4] Plaintiffs insist the agreement of October 6, 1900, and the acts thereunder, do not satisfy these rules, and that the deed of December 27, 1900, was consequently itself a mortgage, and that they own the equity as purchasers at the sales under the Harris judgment. The agreement mentioned expressly provides that the Bank "shall be entitled to receive and hold as its absolute property" the tracts described in the petition in this case, which include those described in the deeds of January, 1900, and the trust deed to the Trust Company in June, 1900. It is also provided that "each party hereto shall execute such conveyances and assignments as may be necessary to carry out this plan."

An examination of the evidence convinces us that the amount owed by Davidson to the Bank and Trust Company, respectively, greatly exceeded the value (at the time) of the properties they were to receive under the agreement of October 6, 1900. That his total assets were of a value far below the amount necessary to pay the Bank and Trust Company is apparent enough from the oral testimony as to such value and from written statements of Davidson

made shortly before the agreement was executed. Further, the failure of Davidson to act in any way upon the offer of the Bank in 1903 to reconvey the property it received and pay a bonus of $25,000, upon payment to it of the Davidson indebtedness, with interest, is some evidence of his own view as to the value of the property
157 involved at a time when it had perceptibly increased, as compared with October, 1900. Despite the fact that the property was worth less than the sums owed the Bank and Trust Company, they agreed to and did pay 40 per cent. of outside indebtedness aggregating approximately $50,000, in consideration of the agreement of October 6, 1900. The motive actuating Davidson to exact, and the Bank and Trust Company to agree to pay, this additional sum (about $20,000), was the fear that these other creditors would institute bankruptcy proceedings, which all parties believed would disastrously reduce the fund available to discharge Davidson's debts.

It is argued that there was no fixed price, and that therefore, the contract of October, 1900, does not show a sale. The authorities cited in this connection generally concern sales of personalty. The record shows that Davidson owed the Bank and Trust Company each more than the value of the property they respectively received pursuant to the contract; that the real consideration of that contract was the accomplishment of a definite object; i. e., the avoidance of bankruptcy proceedings, which it was within the power of creditors other than the Bank and Trust Company to institute. The practical effect of the contract, considered in the light of this common purpose, was that the Bank and Trust Company should effect an agreement whereby bankruptcy proceedings would be avoided, binding themselves to advance a sufficient sum of money, not exceeding 40 per cent. of the amount of the claims of other creditors, to effectuate that purpose. To this arrangement plaintiffs agreed in writing, becoming in a sense a party to it, modified as to their own claim only by the stipulation as to Davidson's notes to them
158 for the 60 per cent. of their claim remaining after their acceptance from the Bank and Trust Company of the $6,421.20, covering 40 per cent. of the amount due them from Davidson. That the transaction was fair on its face, and that Davidson received for his property more than it was worth at the time, and that the Bank and Trust Company parted with thousands of dollars in carrying out their part of the agreement, and that plaintiff and the other creditors understood and agreed to the arrangement, the record amply shows.

[5] But it is said that the provision that the indebtedness should be kept alive until March 1, 1901, and then canceled only in case no bankruptcy proceedings had been instituted, amounted to a continuance of the indebtedness beyond the date of the deed of December, 1900, and therefore that deed must have been merely a security or mortgage until March 1, 1901, and, having been "once a mortgage," remains so.

The position is not tenable. The avoidance of bankruptcy proceedings was one of the principal objects of the parties. The record

shows that such proceedings, which might affect the parties, were possible, in point of time, until March 1, 1901. The purpose of the provision purporting to keep alive the indebtedness until that date was to avoid complications and difficulties which would have arisen had the evidence of debt been canceled, and bankruptcy proceedings subsequently instituted. The object was to insure, by lapse of time, the creditors who were advancing money to avoid bankruptcy proceedings against possible loss of a right to participate in the distribution of the bankrupt estate in case such proceedings were instituted and the property they were to receive under the contract of
159 October, 1900, was drawn into the court of bankruptcy. In other words, the contract merely attempted to fix a time at which it and all things done under it, including the deed of December, 1900, should actually and finally take effect, designedly fixing a time therefor beyond a date when, as the parties believed, bankruptcy proceedings could affect the carrying out of the contract. Regardless of the correctness of the view of the parties as to the effect of the lapse of time upon an effort of other creditors to institute bankruptcy proceedings, the intent of the contracting parties must be given effect in the light of their actual belief at the time, and the actual intent of the parties is the thing to be considered upon the question as to the proper interpretation of the contract provision as to delaying cancellations until March 1, 1901. The effect of that provision merely delayed the closing of the transaction, and did not transform it into a mortgage.

[6] It is also contended that Davidson's notes to the Bank were not canceled as agreed, and the use of one of the notes to release certain property of defendant from the apparent lien of the deed of trust securing that note is relied upon as evidence that the note was still an existing indebtedness and regarded so by the Bank. The evidence shows that the notes were never used or regarded by the Bank as live assets after March 1, 1901. They were treated as canceled by the conveyance of the property to the mortgagee. While, under the contract, the deed of December, 1900, did not vest title in the Bank until March 1, 1901, when all transactions under the contract became finally effective, yet when that time arrived, the title did vest, and there was a merger under the familiar rule.
160 The use of the notes in clearing the record when defendant sold part of the property it had bought from the Bank could not revive the note. That proceeding merely caused the record to show directly and by a release what the law had already effected under the doctrine of merger.

III. In appellant's briefs much is said concerning the rights of creditors of the grantor to assail a deed absolute on its face, but, in fact, a mortgage, by force of an agreement of the parties, and also the briefs discuss the question whether plaintiffs' written agreement that the contract of October 6, 1900, might be carried out constituted an estoppel. These questions need not be discussed. If the transaction assailed was not a mortgage, and our conclusion is that it was not, it is unnecessary to discuss plaintiffs' rights as creditors of David-

son on the theory, contrary to fact, that the transaction was a mortgage. The discussion of estoppel is not pertinent for a like reason. The judgment is affirmed. All concur.

Bond, J., in result.

The foregoing is submitted as a full, true and complete supplemental abstract of the record in this case, so far as it is necessary to properly present the questions suggested for review.

NEW, MILLER, CAMACK & WINGER,
of Kansas City, Missouri;

F. M. HARRIS,
Of Ottawa, Kansas,
Attorneys for Appellees.

161 Be it further remembered, that on the 13th day of April, 1916, there was filed in the office of the clerk of the Supreme Court of the State of Kansas a supplemental abstract of the record, prepared by the appellant, which supplemental abstract is in the words and figures as follows, to-wit:

162 19918.

Filed Apr. 13, 1916. D. A. Valentine, Clerk Supreme Court.

In the Supreme Court of the State of Kansas.

No. 19918.

JOHN SEALY, SEALY HUTCHINGS, GEORGE SEALY, JR., and H. O. STEIN, Partners as Hutchings, Sealy & Co., Appellees.

v.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Appellant.

Appeal from Labette County. Elmer C. Clark, Judge.

Supplemental Abstract and Reply Brief of Appellant.

W. W. Brown and James W. Reid, of Parsons, Attorneys for Appellant.

163 In the Supreme Court of the State of Kansas.

No. 19918.

JOHN SEALY, SEALY HUTCHINGS, GEORGE SEALY, JR., and H. O. STEIN, Partners as Hutchings, Sealy & Co., Appellees.

v.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Appellant.

Supplemental Abstract of Appellant.

The appellant desires to supplement its abstract herein by the following additional statements:

Trial.

This case came on for trial on the 13th day of July, A. D. 1913. The following proceedings were had (Tr. 3):

"The plaintiffs by their attorney, F. M. Harris, offered in
164 evidence the deposition of John Sealy, taken at Galveston, Texas, on May 16th, 1906.

The defendant by its attorney, W. W. Brown, objects to the introduction of any testimony in this case on the ground petition does not state facts sufficient to constitute any action.

And the defendant objects to the original bills of lading as they are incompetent, irrelevant and immaterial, each and every one of them and void under the laws of the State of Missouri, and under the Interstate Commerce Laws.

Objection overruled by the Court. To which ruling of the Court the defendant duly excepted and excepts.

The plaintiff offers in evidence the original twenty-seven (27) bills of lading as they were identified as to the taking of this deposition. (Exhibits 1 to 27.)

The defendant renews the former objection to the bills of lading as being irrelevant, incompetent and immaterial, and void under the Laws of the State of Missouri and under the Interstate Commerce Laws.

Objection overruled by the Court. To which ruling of the Court the defendant duly excepted and excepts."

JOHN SEALY, one of the plaintiffs, testified (deposition taken May 16, 1906):

The freight on those shipments involving the twenty-seven (27) bills of lading was not paid at Galveston.

JOHN SEALY further testified (deposition taken on the 17th day of December, 1913, pages 35-36):

That the drafts on shipments made on the 13th day of June
165 could not have reached Galveston before the 15th, and that the amounts advanced on the 15th, 16th and 18th were on the sixty (60) bills of lading covering thirty-three (33) cars of wheat that arrived and twenty-seven (27) that did not arrive, and that he could not say how much was advanced on the bills of lading covering the 33, and how much was advanced on the bills of lading covering the 27 cars.

There was no evidence introduced in this case showing or tending to show that the defendant had received anything in payment of freight or had received any consideration whatsoever for the issuance of the bills of lading covering twenty-seven (27) cars of wheat.

166 Be it further remembered, That on the 3d day of April, 1916, the same being one of the regular judicial days of the January, 1916, Term of the Supreme Court of the State of Kansas, said Court being in session in its court room in the city of Topeka,

the following proceeding, among others, was had and remains of record in the words and figures as follows, to-wit:

167 In the Supreme Court of the State of Kansas, Monday, April 3, 1916.

No. 19918.

HUTCHINS, SEALY & Co., Appellee,

vs.

M., K. & T. R'L'Y Co., Appellant.

Journal Entry of Submission.

This cause comes on to be heard on the notices of appeal, transcript of the judgment and abstract of the record from the district court of Labette county; and thereupon after oral argument by W. W. Brown for the appellant, and by F. M. Harris for the appellee, said cause is submitted on brief of counsel for both parties and taken under advisement by the court.

168 Be it further remembered, That afterwards, on the 10th day of June, 1916, the same being one of the regular judicial days of the January, 1916, Term of the Supreme Court of the State of Kansas, the said Court being in session at its court room in the city of Topeka, the following proceeding was had and remains of record in words and figures as follows, to-wit:

169 In the Supreme Court of the State of Kansas, Saturday, June 10, 1916.

No. 19918.

JOHN SEALY et al., Appellees,

vs.

THE M., K. & T. R'L'Y Co., Appellant.

Journal Entry of Judgment.

This cause comes on for decision, and thereupon it is ordered and adjudged that the judgment of the court below be affirmed. It is further ordered that the appellant pay the costs of this case in this court, taxed at $—, and hereof let execution issue.

170 Be it further remembered, That on the same day, to-wit, the 10th day of June, 1916, there was filed in the office of

the clerk of the Supreme Court of the State of Kansas, the Syllabus and Opinion of the Court in the above entitled case, which Syllabus and Opinion are in the words and figures as follows, to-wit:

No. 19918.

HUTCHINGS, SEALY & Co., a Partnership, etc., Appellees,

v.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Appellant.

Syllabus by the Court.

Bill of Lading—Issuance without Receipt of Goods—Former Appeals—Changing Grounds of Defense—Estoppel.—The proceedings considered, and held that the defendant is estopped by its answer to the petition and by adjudication of this court in its favor in former appeals from asking that the rights of the parties be now determined by federal statutes claimed to be applicable.

Appeal from Labette District Court—Elmer C. Clark, Judge.

Opinion Filed June 10, 1916. Affirmed.

W. W. Brown, and James W. Reid, both of Parsons, for the appellant.

F. M. Harris, of Ottawa, Alexander New, Arthur Miller, Edwin Camack, and Maurice H. Winger, all of Kansas City, Mo., for the appellees.

The opinion of the court was delivered by

BURCH, *J.*:

This is a third appeal. The nature of the controversy is sufficiently indicated in the former opinions, which dealt with the pleadings. (Railway Co. v. Hutchings, 78 Kan. 758, 99 Pac. 230; Hutchings v. Railway Co., 84 Kan. 479, 114 Pac. 1077.) The case has been tried on its merits and judgment has been rendered in favor of the plaintiff. The defendant appeals. The principal contention is that the bills of lading which are the foundation of the action are void under federal statutes which govern the rights of the parties.

The defendant filed a general demurrer to the plaintiff's petition which was overruled. On the first appeal, which was taken by the defendant, it was argued that the demurrer should have been sustained. No suggestion was made to the court that the case was governed by federal law, and this court adjudged that the demurrer was properly overruled. In its answer the defendant expressly pleaded that the bills of lading were made in the state of Missouri,
were Missouri transactions, and were governed by the law of
172 Missouri. The statutes of the state of Missouri were set out, decisions of the Missouri courts construing the statutes were

cited, and it was expressly alleged that the law of Missouri governed the rights and duties of the parties to the action. On the first appeal this answer was held to be good against the plaintiff's demurrer. The plaintiff replied, setting out the decisions of the courts of Missouri bearing on the subject. The defendant demurred to the reply. On the second appeal it was determined that the question raised was presented in such form that it became one of law for the court and not one of fact for a jury, and the law of the state of Missouri was declared. On these pleadings the case went to trial. A jury was waived, and at the beginning of the trial the following stipulation was made:

"Any decision of the Supreme Court of Missouri, or of any appellate court of Missouri, which any counsel in the case may call to the attention of the court or the Supreme Court of Kansas, or any other court, may be construed as having been offered in evidence; that the Constitution of the State of Missouri and its amendment creating the Kansas City Court of Appeals, and the St. Louis Court of Appeals, and the statutes creating the Springfield Court of Appeals, may be regarded as having been offered in evidence."

The plaintiff offered the bills of lading in evidence. The defendant objected on the ground the bills of lading were void under the laws of the state of Missouri and under the interstate commerce laws. The objection was overruled, and the record is barren of any other suggestion that the interstate commerce laws applied. On its side of the case the defendant offered in evidence the statutes of the state of Missouri which it had pleaded.

Having appealed from the judgment of the district court overruling the demurrer to the petition, and having kept silent then with respect to the application of the federal law, the action of this court is an adjudication of the law of the case, binding on the defendant. The defendant cannot be allowed to settle the law of the case piecemeal any more than it can be allowed to settle the facts in that way. (Estes v. Zinc Co., 97 Kan. 774, 156 Pac. 758.) Besides this, the defendant chose to defend the action on the express ground, pleaded in extenso, that the bills of lading were governed by the law of the state of Missouri and that the rights and duties of the parties in respect to the matters complained of in the
173 petition were defined by the Missouri law. The defendant presented this subject to this court on the first appeal and procured the following adjudication in its favor:

"In an action against a common carrier based upon bills of lading, involving no question with respect to the right of the carrier to limit its common-law liability, the rights and obligations of the parties are to be determined by the law of the place where the contract was made.

"In an action against a common carrier to recover moneys advanced on the faith of bills of lading issued by the agents of the carrier without the actual receipt of the property, an answer which alleges that the bills were executed and delivered in the state of Missouri, that when they were issued the statutes of that state made it unlawful for a common carrier to issue bills of lading without the

actual receipt of the property, and that the supreme court of Missouri has held and still holds, in construing the statute, that all such bills of lading are absolutely void and that no action can be maintained thereon by any holder or assignee, states a good defense as against a demurrer." (Railway Co. v. Hutchings, 78 Kan. 758, syl. ¶¶3, 4, 99 Pac. 230.)

This adjudication was binding on the defendant and on the trial court, and the defendant could not at the subsequent trial, without asking permission to change the issue and while still asserting that the Missouri law governed, shift its defense to some other law. Having been defeated on the theory of the litigation which it proposed and which it induced this court to accept, the defendant is in no position to ask this court to adopt a new theory according to which the propriety of the judgment shall be tested. It is estopped by its pleading and by the adjudications of this court in its favor based on that pleading.

There is nothing else of consequence in the case. The law of Missouri was determined on the second appeal, and that adjudication became the law of the case. Some Missouri decisions later than those considered on the second appeal are cited. If they were conclusive this court might consider the subject of modifying its former opinion, but they are not so, and the views there expressed are adhered to.

It was decided on the first appeal that the action was not barred by limitation, and nothing contained in the abstract indicates that the ruling was wrong or that the plaintiff lost its remedy through laches, which was not pleaded, or lack of diligence.

174 The proof was ample that the bills of lading were issued by the authority of an officer for whose conduct the defendant must answer.

The provision in each bill of lading, that in case of loss or damage sustained by the property receipted for liability should be computed on the basis of the value of the property at the time and place of shipment, has no application. There was no loss or damage sustained by any property receipted for or any shipment of property at any time when or place where value could be assessed. There was no wheat shipped, or to be shipped, or lost, or damaged.

The contract was to deliver wheat to the plaintiff at Galveston. The breach consisted in non-delivery at Galveston, and the plaintiff's loss consisted in its advancements, such advancements being less than what the property itself would have been worth to the plaintiff at Galveston. Adopting the plaintiff's theory, however, the judgment may be sustained by applying payments received to the unsecured portion of the plaintiff's claim, as the law authorized the plaintiff to do and as the law would do in the absence of application by either debtor or creditor. (Crane v. Terminal Railway Co., post.)

The plaintiff's loss was due at once and was readily determinable by computation, and consequently interest was properly allowed.

Other contentions of the defendant are without substantial foundation and the judgment of the district court is affirmed.

175 And afterwards, on the 20th day of July, 1916, there was filed in the office of the clerk of the Supreme Court of the state of Kansas a Petition for a rehearing by the appellant, which Petition is in the words and figures as follows, to-wit:

176 In the Supreme Court of the State of Kansas.

No. 19918.

JOHN SEALY, SEALY HUTCHINGS, GEORGE SEALY, JR., and H. O. STEIN, Partners as Hutchings, Sealy & Co., Appellees,

v.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Appellant.

Petition for Rehearing.

The appellant petitions the court for a rehearing in the above entitled case, on the following ground, to-wit:

The court erred in holding that the defendant is estopped by its answer and by former adjudication of this court from asking that the rights of the parties be now determined by federal statutes.

The trial of this case commenced on July 13, 1913, and at that time the defendant, appellant herein, made claim that the federal statutes were applicable; and ever since that time has urged upon the trial court, and upon this court, that claim. This case involves bills of lading relating to an interstate shipment originating in Missouri and terminating in Texas. This court has held that these bills of lading are contracts, a violation of which gave the plaintiffs their causes of action. It must follow that these contracts relating to interstate shipments are governed by the federal law relating to interstate commerce, whatever that may have been at the time the shipment was made; and it must follow also that the rights and liabilities of the parties depend upon federal legislation, the bills of lading and the common-law rules as accepted and applied in federal
177 courts. (See the case of Cincinnati, New Orleans & Texas Ry. Co. v. Rankin, 60 L. ed. 505, Lawyers' Co-Operative Publishing Company's Advance Sheets, dated July 1, 1916. Also see case of Metz v. Railway, 90 Kan. 460.)

The facts in this case, which determine what law controls, have been apparent from the inception of the case. The shipments and contracts alleged in plaintiffs' petition related to interstate commerce, and federal enactments and laws superseded the laws of the state of Missouri.

Manifestly the shipment was interstate commerce, and under the settled doctrine established by our former opinions. Rights and liabilities in connection therewith depend upon acts of congress, the bill of lading and common-law principles accepted and enforced by the federal courts."

Express Co. v. Byers, 60 L. ed. 410, Advance Sheets, dated May 1, 1916.

The pleading of the Missouri Statutes was the pleading of an immaterial fact, and was surplusage, and should have been rejected by the courts as surplusage. In a former hearing of this case, averments made by the plaintiffs in their petition, to the effect that the bills of lading were issued fraudulently and claiming damages in tort, were rejected by the court as surplusage, and it was held that the action was one on the contract.

The case of Missouri, Kansas & Texas Ry. Co. v. Murphy, 75 Kan., 707, contained allegations applicable to an action in ejectment and claiming ownership of the real property in controversy, which was a portion of the right of way of the defendant, and the prayer was for ejectment of the defendant. Notwithstanding such allegations, the court construed the action to be an action confirming the title of the land in the railroad company and awarded the recovery of the value of the right of way. In doing so, the court disregarded immaterial allegations of the petition.

178 In this state pleadings must contain a statement of facts constituting the cause of action or defense (Sec. 5685, Laws of Kansas 1909), and the pleader is not required to state under what law he claims his cause of action falls: "and generally, if he should make such a statement and be mistaken, his statement would be immaterial. All that a plaintiff is now required to do is to state the facts constituting his cause of action in ordinary and concise language and without repetition."

Cockrell v. Henderson, 81 Kan. 335.

If a party should make an admission of the existence of a fact in his brief without regard as to what the record shows, it has been held in this state that there would be nothing about such an admission that would operate as an estoppel.

Light v. Waller, 65 Kan. 514, 522.

If the federal law controls this action, it certainly must follow that allegations relative to what the Missouri law was, were immaterial and surplusage.

This court had before it the fact that this involved an interstate shipment, and therefore was controlled by the federal law. The court was cognizant of such law and knew that the rights and liabilities of the parties were defined by such law. This court knew that the Missouri statutes and law were superseded by the federal law, and that part of defendant's pleadings was surplusage.

The case of Railway v. Wulf, 226 U. S. 570, 57 L. ed. 355, was brought to recover damages for the death of an employe of the railroad, and the action set up the Kansas statutes and claimed liability under such statutes. Afterwards, liability was claimed under the federal statutes. It was urged that plaintiff could not shift, after the statutes of limitations had run, from a cause of action under the Kansas statute to one under the federal statute. The court in passing on this question said, page 363:

179 "It is true the original petition asserted a right of action under the laws of Kansas, without making reference to the

act of Congress. But the court was presumed to be cognizant of the enactment of the employers' liability act, and to know that, with respect to the responsibility of interstate carriers by railroad to their employees injured in such commerce after its enactment, it had the effect of superseding state laws upon the subject. Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 53, 56 L. ed. 327, 347, 38 L. R. A. (N. S.) 44, 32 Sup. Ct. Rep. 169. Therefore the pleader was not required to refer to the Federal act, and the reference actually made to the Kansas statute no more vitiated the pleading than a reference to any other repealed statute would have done."

All the material facts were before the court, and, while there may have been immaterial facts; yet, the responsibility for the correctness of the decision must rest with the court. It is frequently true that erroneous theories are presented in the briefs by counsel, and frequently citations of controlling cases and precedents are omitted in briefs; but, the responsibility for determining correct principles of law must lie with the courts. If the federal law applies to the facts as they are presented in this case, and the rights and liabilities of the parties under such law are different from that which has been determined to be the rights and liabilities of the parties under the Missouri law; then it is not too late for this court to correct the error, and the court, it seems to us, should not hesitate to make such correction. We have called the attention both of the trial court and of this court to such matters, and there has been ample time within which a miscarriage of justice might have been and might be avoided, if such is the result of the former decisions of this court.

We urge upon the court the further consideration that it is beyond the power of the parties deliberately to make such contracts as those involved in this action, and it would seem to be an absurdity to say
that the parties could choose the laws that apply to the trans-
180 actions, by setting up such law in a pleading and refraining from calling the attention of the court to the existence of the proper principle involved. The whole scheme of the interstate commerce act would preclude such a conclusion.

In the case of Southern Railway v. Prescott, 60 L. ed. 469, Lawyers' Co-Operating Publishing Company's Advance Sheets, dated May 15, 1916, it is held:

"1. Whether the arrival of an interstate shipment at destination, the payment of the freight by the consignee, his signature to a receipt for the shipment, and his removal of a part of the goods, leaving the rest, with the carrier's permission, to meet his convenience in removal, discharged the carrier's contract set forth in the bill of lading issued pursuant to the act of February 4, 1887 (24 Stat. at L. 379, chap. 104), as amended by the act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, Comp. Stat. 1913, sec. 8563), and created a new obligation as warehouseman, governed by the local law, which casts upon the warehouseman, in case of a loss by fire, the burden of showing that it was not negligent,—is a Federal question which will support the appellate jurisdiction of the Federal Supreme Court over a state court."

"3. The parties to an interstate shipment may not, by special agreement, alter the conditions specified in the bill of lading governing the carrier's liability when a shipment is not removed within forty-eight hours after notice to the consignee of its arrival, which conform to the carrier's published regulations."

In the opinion the court said (page 472):

"The court deemed it to be evident 'that Congress recognized that the duty of carriers to the public included the performance of a variety of services that, according to the theory of the common law, were separable from the carrier's service as carrier, and, in order to prevent overcharges and discriminations from being made under the pretext of performing such additional services, it enacted that so far as interstate carriers by rail were concerned, the entire body of such services should be included together under the single term "transportation" and subjected to the provisions of the act respecting reasonable rates and the like.' It is also clear that, with respect to the service governed by the Federal statute, the parties were not at liberty to alter the terms of the service as fixed by the filed regulations. This has repeatedly been held with respect to rates (Texas & P. R. Co. v. Mugg, 202 U. S. 242, 50 L. ed. 1011, 26 Sup. Ct. Rep. 628; Kansas City Southern Ry. Co. v. Carl, 227 U. S. 639, 652, 57 L. ed. 683, 688, 33 Sup. Ct. Rep. 391; Boston & M. R. Co. v. Hooker, 233 U. S. 97, 112, 58 L. ed. 868, 876, L. R. A. 1915B, 450, 34 Sup. Ct. Rep. 526, Ann. Cas. 1915D, 593; Louisville & N. R. Co. v. Maxwell, 237 U. S. 94, 59 L. ed. 853, L. R. A. 1915E, 665, P. U. R. 1915C, 300, 35 Sup. Ct. Rep. 494), and the established principle ap-
181 plies equally to any stipulation attempting to alter the provisions as fixed by the published rules relating to any of the services within the purview of the act, Chicago & A. R. Co. v. Kirby, 225 U. S. 155, 166, 56 L. ed. 1033, 32 Sup. Ct. Rep. 648, Ann. Cas. 1914A, 501; Atchison, T. & S. F. R. Co. v. Robinson, 233 U. S. 173, 181, 58 L. ed. 901, 905, 34 Sup. Ct. Rep. 556. This is the plain purpose of the statute in order to shut the door to all contrivances in violation of its provisions against preferences and discriminations. No carrier may extend 'any privileges or facilities,' save as these have been duly specified. And as the terminal services incident to an interstate shipment are within the Federal act, and the conditions of liability while the goods are retained after notice of arrival are stipulated in the bill of lading under the filed regulations, the conditions thus fixed are controlling, and the parties cannot substitute therefor a special agreement.

* * * * * * *

Viewing the contract set forth in the bill of lading as still in force, the measure of liability under it must also be regarded as a Federal question. As it has often been said, the statutory provisions manifest the intent of Congress that the obligation of the carrier with respect to the services within the purview of the statute shall be governed by uniform rule in the place of the diverse requirements of state legislation and decisions."

It is the uniform rule that incorrect information given to a

prospective shipper does not estop the carrier from collecting the correct rate after the shipment is made.

The defendant in this case has consistently claimed that these bills of lading were void, and would not support causes of action. The court, we think, is in error in failing to apply the dominant, controlling principle of law, and in failing to give defendant the benefit of those rights and privileges which the federal law afford. Property of this defendant should not be taken unless in accordance with the law that is applicable.

Respectfully submitted,

W. W. BROWN,
JAMES W. REID,
Of Parsons, Attorneys for Appellant.

182 [Endorsed:] No. 19,918. In the Supreme Court of the State of Kansas. John Sealy et al., Appellees, vs. M., K. & T. Ry. Co., Appellant. Petition for Rehearing.

183 And afterwards, on the 21st day of July, 1916, the same being one of the regular judicial days of the July 1916 Term of the Supreme Court of the State of Kansas, said Court being in session at its court room in the city of Topeka, the following proceeding, among others, was had and remains of record in the words and figures as follows, to-wit:

184 In the Supreme Court of the State of Kansas, Friday, July 21, 1916.

No. 19918.

HUTCHINGS, SEALY & Co., Appellee,

v.

M., K. & T. R'L'Y Co., Appellant.

Journal Entry Denying Petition for Rehearing.

Now comes on for decision the petition for a rehearing of this cause, and thereupon it is ordered that said petition for a rehearing be denied.

185 STATE OF KANSAS,
Supreme Court, ss:

I, D. A. Valentine, Clerk of the Supreme Court of the State of Kansas, do hereby certify that the above and foregoing is a full, true, correct and complete transcript of the record and proceedings in the above entitled case, and also of the Opinion of the Court rendered thereon, as the same now appear on file and of record in my office.

In Testimony Whereof, I have hereunto set my hand and affixed

the seal of said Court at my office in Topeka, Kansas this 12th day of December, A. D. 1916.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk Supreme Court of Kansas.

186 Here follow:
The original Petition for Writ of Error.
The original Assignments of Error.
The original Writ of Error.
The original Citation and Proof of Service thereof.
And copy of Bond for Appeal.

187 Filed Dec. 4, 1916. D. A. Valentine, Clerk Supreme Court.

The Supreme Court of the State of Kansas.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Plaintiff in Error,

v.

JOHN SEALY, SEALY HUTCHINGS, GEORGE SEALY, JR., and H. O. STEIN, Partners as Hutchings, Sealy & Co., Defendants in Error.

Petition for Writ of Error.

To the Honorable William A. Johnston, Chief Justice of the Supreme Court of the State of Kansas:

The petition of the Missouri, Kansas & Texas Railway Company respectfully shows that on the 10th day of June, A. D. 1916, the Supreme Court of the State of Kansas rendered a final judgment against your petitioner in a certain cause, wherein John Sealy, Sealy Hutchings, George Sealy, Jr., and H. O. Stein, Partners as Hutchings, Sealy & Co., were appellees, and your petitioner was appellant, for $6,520.29 and for costs, and awarded execution thereon; that on the 21st day of July, 1916, the petition of the appellant for rehearing was overruled and denied by the said Supreme Court of the state of Kansas, all of which will fully appear by reference to the record of the proceedings in said cause; that said court is the highest court of said state in which a decision in said suit could be had.

And your petitioner claims the right to remove said judgment to the Supreme Court of the United States by a writ of error,
188 under Section 237 of the Judicial Code, being an act of March 3, 1911, as amended by an act approved December 23, 1914, and further amended by an act approved September 6, 1916, because a title, right, privilege and immunity was claimed by the Missouri, Kansas & Texas Railway Company under a statute of the United States and the decision was against such title, right,

privilege and immunity specially set up and claimed by said Missouri, Kansas & Texas Railway Company; and there was drawn in question the validity and construction of a statute of the United States and the decision was against the title, right, privilege and immunity specially set up under such statute of the United States, all of which will appear by the assignments of error and the record of the proceedings in said cause, which are herewith transmitted.

Wherefore, your petitioner prays that a writ of error may issue from the Supreme Court of the United States to the Supreme Court of the State of Kansas for the correction of the errors complained of, and for citation.

And your petitioner will ever pray.

JOSEPH M. BRYSON,
W. W. BROWN,
JAMES W. REID,
Attorneys for Missouri, Kansas & Texas Railway Company, Petitioner.

189 The writ of error prayed for in the above petition is hereby allowed this — day of ——, 1916.

——— ———,
Chief Justice of the Supreme Court of the State of Kansas.

190 [Endorsed:] No. —. The Supreme Court of the State of Kansas. M., K. & T. Ry. Co., Pl't'ff in Error, vs. John Sealy et al., Partners as Hutchings, Sealy & Co., Def'ts in Error. Petition for Writ of Error. Filed Dec. 4, 1916. D. A. Valentine, Clerk Supreme Court.

191 Filed Dec. 4, 1916. D. A. Valentine, Clerk Supreme Court.

The Supreme Court of the State of Kansas.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Plaintiff in Error,

v.

JOHN SEALY, SEALY HUTCHINGS, GEORGE SEALY, JR., and H. O. STEIN, Partners as Hutchings, Sealy & Co., Defendants in Error.

Order Allowing Writ of Error.

The above entitled matter coming on to be heard upon the petition of the plaintiff in error therein, Missouri, Kansas & Texas Railway Company, for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Kansas, and upon examination of said petition and the record in said matter, and desiring to give the said petitioner an opportunity to present to the Supreme Court of the United States the questions presented in said matter:

It is hereby ordered that a writ of error be, and is hereby, allowed to this court from the Supreme Court of the United States.

W. A. JOHNSTON,
Chief Justice of the Supreme Court of the State of Kansas.

192 [Endorsed:] No. —. The Supreme Court of the State of Kansas. M., K. & T. Ry. Co., Pl'ff in Error, vs. John Sealy et al., Partners as Hutchings, Sealy & Co., Def'ts in Error. Order allowing Writ of Error. Filed Dec. 4, 1916. D. A. Valentine, Clerk Supreme Court.

193 Filed Dec. 4, 1916. D. A. Valentine, Clerk Supreme Court.

The Supreme Court of the State of Kansas.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Plaintiff in Error,

v.

JOHN SEALY, SEALY HUTCHINGS, GEORGE SEALY, JR., and H. O. STEIN, Partners as Hutchings, Sealy & Co., Defendants in Error.

Assignment of Errors.

Now comes the said plaintiff in error, Missouri, Kansas & Texas Railway Company, and respectfully represents that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Kansas in the above entitled cause, there is error in the following particulars, to-wit:

First. The court erred in sustaining the judgment in favor of the defendants in error and against the plaintiff in error, and in refusing the plaintiff in error a new trial herein.

Second. The court erred in holding that the bills of lading, on which the causes of action be ught by the defendants in error were based, were valid.

Third. The court erred in holding that under the Federal Interstate Commerce Act, be[illegible]e act of February 4, 1887, as amended, the bills of lading on whi[illegible]is action was brought, had any validity and would support causes of action.

194 Fourth. The court erred in holding that the said Missouri, Kansas and Texas Railway Company was estopped from claiming the title, right, privilege and immunity afforded it by the interstate commerce act of the United States, approved February 4, 1887, as amended.

Fifth. The court erred in overruling the objection made by the plaintiff in error to the introduction of any evidence on the trial of this case.

Sixth. The court erred in admitting in evidence Exhibits numbered 1 to 27, being the bills of lading on which the causes of action herein are based, over the objection of the plaintiff in error that the

said bills of lading were invalid under the interstate commerce laws of the United States.

Seventh. The court erred in entering final judgment in said case against the plaintiff in error.

Wherefore, the said Missouri, Kansas & Texas Railway Company, plaintiff in error, prays for a reversal of the judgment and decision of the Supreme Court of the State of Kansas, entered in the above entitled cause.

JOSEPH M. BRYSON,
W. W. BROWN,
JAMES W. REID,
Attorneys for Missouri, Kansas & Texas Railway Company, Plaintiff in Error.

195 [Endorsed:] No. —. The Supreme Court of the State of Kansas. M., K. & T. Ry. Co., Pl'ff in Error, vs. John Sealy et al, Partners as Hutchings, Sealy & Co., Def'ts in Error. Assignments of Errors. Filed Dec. 4, 1916. D. A. Valentine, Clerk Supreme Court.

196 Filed Dec. 4, 1916. D. A. Valentine, Clerk Supreme Court.

The Supreme Court of the State of Kansas.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Plaintiff in Error,

v.

JOHN SEALY, SEALY HUTCHINGS, GEORGE SEALY, JR., and H. O. STEIN, Partners as Hutchings, Sealy & Co., Defendants in Error.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Kansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the Supreme Court of the state of Kansas, before you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between Missouri, Kansas & Texas Railway Company, Plaintiff in Error, and John Sealy, Sealy Hutchings, George Sealy, Jr., and H. O. Stein, Partners as Hutchings, Sealy & Co., Defendants in Error, wherein a title, right, privilege and immunity was claimed by the Missouri, Kansas & Texas Railway Company under a statute of the United States, and the decision was against such title, right, privilege and immunity specially set up and claimed by said Missouri, Kansas & Texas Railway Company; and wherein was drawn in question the validity

and construction of a statute of the United States, and the
197 decision was against the title, right, privilege and immunity specially set up under such statute of the United States; a manifest error hath happened, to the great damage of the said Missouri, Kansas & Texas Railway Company, as by its complaint appears; we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in its behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and the proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same in said Supreme Court at Washington within thirty (30) days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the said Supreme Court, the 4 day of December, in the year of our Lord, 1916.

[Seal of District Court U. S., District of Kansas.]

MORTON ALBOUGH,
Clerk of the District Court of the United States
for the District of Kansas.

Allowed by:

W. A. JOHNSTON,
Chief Justice of the Supreme Court
of the State of Kansas.

198 [Endorsed:] No. —. The Supreme Court of the State of Kansas. M., K. & T. Ry. Co., Pl't'ff in Error, vs. John Sealy et al. Partners as Hutchings, Sealy & Co., Def'ts in Error. Writ of Error. Filed Dec. 4, 1916. D. A. Valentine, Clerk Supreme Court.

199 Filed Dec. 4, 1916. D. A. Valentine, Clerk Supreme Court.

The Supreme Court of the State of Kansas

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Plaintiff in Error,

v.

JOHN SEALY, SEALY HUTCHINGS, GEORGE SEALY, JR., and H. O. STEIN, Partners as Hutchings, Sealy & Co., Defendants in Error.

Citation.

UNITED STATES OF AMERICA, *ss:*

To John Sealy, Sealy Hutchings, George Sealy, Jr., and H. O. Stein, Partners as Hutchings, Sealy & Co., Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States to be holden at Washington, within thirty (30) days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the State of Kansas, wherein the Missouri, Kansas & Texas Railway Company, a corporation, is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness my hand this 4th day of December, A. D. 1916.

[Seal Supreme Court, State of Kansas.]

W. A. JOHNSTON,
Chief Justice of the Supreme Court of the State of Kansas.

Attest:
D. A. VALENTINE,
Clerk Sup. Ct.

200 Copy of the within citation served on us this 7th day of December, A. D. 1916.

F. M. HARRIS,
NEW, MILLER, CAMACK & WINGER,
Attorneys of Record for John Sealy, Sealy Hutchings, George Sealy, Jr., and H. O. Stein, Partners as Hutchings, Sealy & Co., Defendants in Error.

201 [Endorsed:] 19,918. M., K. & T. Ry. Co., Pl'ff in Error, v. Hutchins, Sealy & Co. et al., Def'ts in Error. Citation. Issued Dec. 4th, 1916. Filed Dec. 12 1916. D. A. Valentine, Clerk Supreme Court.

202 The Supreme Court of the State of Kansas.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Plaintiff in Error,

v.

JOHN SEALY, SEALY HUTCHINGS, GEORGE SEALY, JR., and H. O. STEIN, Partners as Hutchings, Sealy & Co., Defendants in Error.

Bond on Writ of Error.

Know all men by these presents, that we, the undersigned, Missouri, Kansas & Texas Railway Company, as Principal, and J. F. Steele of Parsons, Kansas, as surety, are held and firmly bound unto John Sealy, Sealy Hutchings, George Sealy, Jr., and H. O. Stein, Partners as Hutchings, Sealy & Co., in the sum of One Thousand and No/100 ($1,000.00) Dollars to be paid to the said Obligees, their heirs, executors and administrators, successors and assigns; to the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, successors and assigns jointly and severally, by these present.

Sealed with our seals and dates this 4th day of December, A. D. 1916.

Whereas the above named plaintiff in error hath prosecuted a writ of error in the supreme court of the United States to reverse the judgment rendered on June 10, 1916, in the above entitled action by the supreme court of the state of Kansas;

Now, therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute its said writ of error to effect, and answer only all costs if it shall fail to make good its plea, then this obligation shall be void; otherwise to be and remain in full force and effect.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY,
By W. W. BROWN,
Its General Attorney, Principal.
J. F. STEELE, *Surety.*

Indorsed: No. 19918. The Supreme Court of the state of Kansas. Missouri, Kansas and Texas Ry. Co., plaintiff in error, vs. John Sealy et al., Partners as Hutchings, Sealy & Co., Defendants in error. Bond for costs on Writ of Error. Approved this 6th day of December 1916. W. A. Johnston, Chief Justice. (Filed Dec. 6, 1916. D. A. Valentine, clerk supreme court.)

203 STATE OF KANSAS,
Supreme Court, ss:

I, D. A. Valentine, Clerk of the Supreme Court of the State of Kansas, do hereby certify that there was lodged with me as such clerk on the — day of November, 1916, in the above entitled case:

1. The original Bond of which a copy is herein set forth.
2. Two copies of Writ of Error, as herein set forth, one for each defendant and one to file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at my office in Topeka, Kansas, this 12th day of December, A. D. 1916.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk Supreme Court of Kansas.

204 THE UNITED STATES OF AMERICA,
Supreme Court of Kansas, ss:

In obedience to the commands of the within writ, I herwith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, together with all things concerning the same.

In Witness Whereof, I hereunto subscribe my name and affix the seal of the said Supreme Court of Kansas in the City of Topeka, this 12th day of December, A. D. 1916.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk Supreme Court of Kansas.

Endorsed on cover: File No. 25,671. Kansas Supreme Court. Term No. 841. Missouri, Kansas & Texas Railway Company, plaintiff in error, vs. John Sealy, Sealy Hutchings, George Sealy, Jr., and H. O. Stein, partners as Hutchings, Sealy & Co. Filed January 2, 1917. File No. 25,671.

SUBJECT-INDEX OF CONTENTS.

Cases Cited.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 90.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY,
Plaintiff in Error,

v.

JOHN SEALY, SEALY HUTCHINGS, GEORGE SEALY, JR., and H. O. STEIN, Partners as Hutchings, Sealy & Co.,
Defendants in Error.

In Error to the Supreme Court of the State of Kansas.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

STATEMENT.

The defendants in error on the 4th day of February, 1914, recovered a judgment against the plaintiff

in error in the sum of $6,520.29. This action was brought in the District Court of Labette County, Kansas, March 29, 1905, and is based on fictitious bills of lading. On June 13, 14, 15, and 16, 1900, J. K. Davidson & Co., J. K. Davidson, sole proprietor, operated an elevator at Kansas City, Missouri, and obtained from an agent of the Missouri, Kansas & Texas Railway Company sixty bills of lading, said Davidson representing to said agent that sixty carloads of wheat had been delivered to said railway company for transportation from Kansas City, Missouri, to Galveston, Texas. This representation on the part of Davidson was false and untrue; in fact, only thirty-three carloads of wheat had been delivered to the Missouri Kansas & Texas Railway Company for transportation, and therefore twenty-seven of these bills of lading, purporting to cover an aggregate of 29,100 bushels of wheat, were issued by the agent of the railway company without receipt of the wheat at that time, or at any other time, and consequently, were fictitious and untrue (Tr., pp. 3-15) and false in the statement as to the receipt of any wheat whatever. No wheat was ever received or shipped under these twenty-seven bills of lading, and no service was ever rendered by the carrier or required by the shipper, and no freight bill was ever paid at origin or at destination, nor was any other consideration paid for the issuance of these twenty-seven fictitious bills.

On receiving these sixty bills of lading, said J. K. Davidson & Co. immediately took them to a bank at Kansas City, Missouri, attached drafts to them and drew upon the defendants in error, Hutchings, Sealy & Co., at Galveston, Texas. Hutchings, Sealy & Co. advanced to J. K. Davidson & Co. on these drafts, on the sixty bills of lading (including the 27 fraudulent bills), $37,200.00 (Tr., pp. 42-58). The elevator of Davidson & Co., soon after that time was destroyed by fire. By the sale of wheat and from various other sources, there was repaid to Hutchings, Sealy & Co., the sum of $36,585.02 (Tr., pp. 42-58); but, inasmuch as Davidson & Co. had not specifically directed application of these payments, Hutchings, Sealy & Co. applied part of this sum in payment of prior indebtedness, leaving due from Davidson & Co. to Hutchings, Sealy & Co. the sum of $4,815.90 (Tr., p. 57) for which recovery was sought under the 27 fictitious bills of lading. There was added by the Court (Tr., pp. 57-58) to this original sum, interest at the rate of six per cent per annum as on a liquidated claim, making the total, as stated, $6,520.29, for which judgment was rendered.

The defendant below, plaintiff in error, filed a general demurrer to plaintiff's petition, which demurrer was overruled. The defendant then filed an answer (Tr., p. 15), in which it was alleged that the bills of lading were void and would not support a cause of

action. It was also alleged in said answer that under the statutes of the State of Missouri, which were quoted, and under the decisions of the highest court of appellate jurisdiction in that State, all bills of lading or receipts issued by agents of a railroad company, when the property described therein had not been delivered and was not under the control of the railroad company at the time of the issuance of said receipts or bills of lading, were absolutely void and conveyed no title to the consignor nor by indorsement to the assignee, nor to any other person; nor could an assignee recover by virtue of the issuance and delivery of such bills of lading either by estoppel, or in any other way, against the railroad, whose agent issued the same. The plaintiffs below, defendants in error, filed a general demurrer to that answer. The lower court sustained the demurrer. An appeal was taken on this ruling, as well as on the ruling of the court overruling the defendant's demurrer to plaintiff's petition, to the Supreme Court of Kansas, where it was held (*Railway v. Hutchings, Sealy & Co.*, 78 Kan. 758):

> "1. Petition — Construction — Action *ex Contractu* or *ex Delicto*.
>
> Where a petition contains a good cause of action for a breach of contract the addition of words or averments which are appropriate to a cause of action for a wrong will not change the

action from contract to tort. And in case of doubt the courts are inclined against construing the pleading as embodying a cause of action for a tort.

2. Carriers—Bills of Lading—Possession of the Property—Innocent Purchaser. Whether the agents of a common carrier have authority to bind the carrier by the issue of bills of lading when the property is not in the possession of the carrier is a question upon which two antagonistic doctrines prevail: *(a)* One holds that it is not within the scope of the authority of an agent of a common carrier to issue a bill of lading without the actual receipt of the goods, and that the bill of lading so issued conveys no rights to an innocent holder thereof. This rule obtains in the Federal courts, and in many of the State courts. *(b)* The second holds the carrier liable because the knowledge whether the goods have been received, and therefore the power in fact conferred, lies peculiarly with the carrier's agent, who is held out to the public as having authority to make a statement upon which innocent parties may rely, and the carrier is therefore estopped to deny the receipt of the goods as stated in the bill This doctrine, resting upon the principle of estoppel *in pais*, is the law in Kansas, as declared in Savings Bank v. A. T. & Santa Fe Rld. Co., 20 Kan. 519.

3. Contracts—Bills of Lading—Proper Law of the Contract. In an action against a common carrier based upon bills of lading, involving no question with respect to the right of the carrier to limit its common-law liability, the rights and

obligations of the parties are to be determined by the law of the place where the contract was made.

4. ————Action to Recover Money Advanced on Bill of Lading Issued without Possession of Property—Defense. In an action against a common carrier to recover moneys advanced on the faith of bills of lading issued by the agents of the carrier without the actual receipt of the property an answer which alleges that the bills were executed and delivered in the State of Missouri, that when they were issued the statutes of that state made it unlawful for a common carrier to issue bills of lading without the actual receipt of the property, and that the Supreme Court of Missouri has held and still holds, in construing the statute, that all such bills of lading are absolutely void and that no action can be maintained thereon by any holder or assignee, states a good defense as against a demurrer."

When this case was returned to the lower court, the plaintiffs filed a reply and defendants filed a general demurrer to this reply; the demurrer was sustained by the lower court, and the plaintiffs appealed. The Supreme Court of Kansas on this second appeal (*Hutchings, Sealy & Co. v. Railway,* 84 Kan. 479) held:

"1. Law of Another State—Determination by Court or Jury. A question as to what is the law of another state, although one of fact, is ordi-

narily to be determined by the Court without the intervention of the jury.

2. ——— Same. Where the question as to what is the law of another state depends upon the effect to be given to a decision made by its court of last resort and upon the interpretation of a statute, and all the reported decisions relating to the matter are admitted, and show a difference of judicial opinion, there is no occasion for evidence on the subject. Under such circumstances the question should be decided by the court practically as one of law.

3. Bill of Lading—Negotiability. A statute of Missouri provides that 'all * * * bills of lading * * * issued * * * by any * * * railroad company * * * shall be * * * negotiable by written indorsement thereon, and delivery in the same manner as bills of exchange and promissory notes' (3 Rev. Stat. Mo. 1909, section 11956). In that state bills of lading were already negotiable in the sense of being transferable by endorsement and delivery so as to enable the assignee to sue in his own name. *Held,* that the statute makes them negotiable in the stricter meaning of the term—that is, it gives them the quality of investing an innocent purchaser with greater rights than those possessed by the original holder.

4. ————Issuance without Receipt of Goods —Innocent Purchaser. Under such a statute a railroad company is bound by a bill of lading which has passed into the hands of an innocent purchaser, although no goods were in fact received by it.

5. ————Crime to Issue without Receipt of

Goods—Negotiability. The rule is not altered by the fact that the statute makes it a criminal offense for any agent of a railroad company to issue a bill of lading unless the goods have actually been received."

The Supreme Court reversed the ruling of the lower court and remanded the case with directions to overrule the demurrer to the reply and to proceed in accordance with the views expressed in the opinion. The trial of the case commenced in the trial court on July 13, 1913. The defendant objected to the introduction of any testimony in said cause, on the ground that the petition did not state facts sufficient to constitute a cause of action because the bills of lading were void under the Federal laws relating to interstate commerce (Tr., p. 82). This objection was overruled and exceptions taken. When the plaintiff sought to introduce the original bills of lading in evidence, the defendant objected to the introduction of these bills of lading on the ground that they were void under the provisions of the interstate commerce laws. These objections were overruled by the Court and exceptions taken. Findings of facts were made by the Court and judgment was rendered against the defendant. The defendant then filed appropriate motions to set aside the judgment of the lower court and for a new trial, which motions were overruled. The case was then appealed to the Supreme Court and a

decision was given on June 10, 1916, affirming the judgment of the lower court. The Court held in this (*Hutchings, Sealy & Co. v. Railway,* 98 Kan. 225), as follows (Tr., p. 84):

> "Bill of Lading—Issuance without Receipt of Goods—Former Appeals—Changing Grounds of Defense—Estoppel. The proceedings considered, and held that the defendant is estopped by its answer to the petition and by adjudications of this Court in its favor in former appeals from asking that the rights of the parties be now determined by Federal statutes claimed to be applicable."
>
> To reverse this judgment of the Supreme Court of Kansas, this writ of error is prosecuted.

SPECIFICATIONS OF ERROR.

The Supreme Court of Kansas erred in the above-entitled case in the following particulars, to wit:

1. The Court erred in sustaining the judgment in favor of defendants in error and against the plaintiff in error, and in refusing the plaintiff in error a new trial herein.

2. The Court erred in holding that the bills of lading on which the causes of action brought by the defendants in error were based were valid.

3. The Court erred in holding that under the Federal Interstate Commerce Act of February 4, 1887, as amended, the bills of lading on which this action was brought had any validity and would support causes of action.

4. The Court erred in holding that the said Missouri, Kansas & Texas Railway Company was estopped from claiming title, right, privilege and immunity under the Act of February 4, 1887, as amended.

5. The Court erred in overruling defendant's objection to the introduction of any testimony on the trial of this case.

6. The Court erred in admitting in evidence Exhibits 1 to 27, being the bills of lading on which the causes of action herein were based, over the objection

of the plaintiff in error that the same bills of lading were invalid under the Interstate Commerce Law of the United States.

7. The Court erred in rendering final judgment in said cause against the plaintiff in error.

ARGUMENT.

I.

The cause of action sued upon arose under alleged contracts purporting to cover the interstate transportation of freight. The validity of the alleged contracts and the liability of the carrier, if any, were therefore questions of Federal law, governed by the Interstate Commerce Act and Federal decisions.

This action is based on the twenty-seven bills of lading, and the judgment of the lower court rests upon the ground that these bills of lading are contracts providing for the delivery of certain quantities of wheat at Galveston, Texas, and an assignment of the contracts to the plaintiffs below, and a subsequent failure on the part of the defendant below to carry out the terms of the contract by delivering the wheat, with consequent damages, the amount of the damages being measured by the amount advanced by the plaintiffs below to Davidson. These bills of lading were issued in June, 1900, and this action was brought in March, 1905, and would have been barred by the statutes of limitations unless predicated on written contracts.

The Supreme Court of Kansas held that the bills of lading are contracts upon which the causes of action are based, saying:

> "The first question for us to determine, therefore, is whether this is an action *ex delicto* or

ex contractu. By the common law a bill of lading conferred upon the assignee only the title to the property of which it was the evidence, and the shipper might sue the carrier for damages to the goods regardless of whether he had any property in them or not. When he assigned the bill of lading he parted with none of his original rights under the contract, except the right of possession of the goods. The assignee could bring no action against the carrier for damage to the goods on the contract of shipment (1 Hutch. Car., 3d Ed., Sec. 197). The assignee could, however, have his action in trover or replevin, because of his right to possession (Thompson v. Dominy, 14 M. & W., Eng. 402). The English statute making bills of lading negotiable altered the common-law rule. In this country, wherever the assignment of a chose in action carries with it the right to sue thereon, the assignee may, of course, maintain an action in his own name for any breach of the contract. He may bring trover or sue for conversion or in replevin, and these would be actions in tort; but where he sues for money advanced on the faith of the bill of lading the action, we think, is an action on the contract.

"In the petition in this case there are averments which are sufficient to set up a cause of action for a breach of contract; and there are averments that the bills were issued fraudulently, and that by reason thereof the plaintiffs suffered damage, but these latter may be regarded as merely statements averring a breach of contract, for it sufficiently appears that the action is solely

to recover the amount advanced upon the faith of the statements contained in the contracts. The doctrine is well settled that where a petition contains a good cause of action for a breach of contract the addition of words or averments which are appropriate to a cause of action for a wrong will not change the action from contract to tort (2 Beach, Mod. Law of Cont., Sec. 1679, note). And in case of doubt the courts are inclined against construing the pleading as embodying a cause of action for a tort (Goodwin *et al.* v. Griffis, 88 N. Y. 629; Austin v. Rawdon, 44 N. Y. 63). This being an action on contract, the five-year statute applies, and both actions being on contract, and on the same contract—to recover moneys advanced on the faith of the bills of lading—they are not inconsistent."

Railway v. Hutchings, Sealy & Co., 78 Kan. 758, *762*.

Therefore, the liability sought to be enforced is the liability of an interstate carrier for loss or damage which is alleged to have been caused by the issuance of interstate contracts of shipment. The validity of the contract and the liability of the carrier is a Federal question and must be determined under Federal statutes and the general common law as announced in Federal decisions.

Railway v. Wall, 241 U. S. 87, 60 L. Ed. 905.

The case of *Friedlander v. Texas & P. R. Co.*, 130 U. S. 416, was based on fictitious bills of lading issued by the agent of the railroad company at Sherman, Texas, describing cotton to be transported from Sherman, Texas, to New Orleans, Louisiana. The cotton never was delivered to the railroad company. The bill of lading was in form negotiable and transferable by endorsement and, relying upon the facts stated therein, that cotton had been delivered to the railroad to be transported as aforesaid, plaintiffs advanced certain sums of money to the consignor. On the hearing of this case, in the United States Supreme Court, it was contended that certain local statutes of the State of Texas applied to the bill of lading; but, this court held that this bill of lading was an instrument of interstate commerce, although no such commerce had actually come to the possession of the railroad company for transportation. The court said:

> "Under the Texas statutes, the trip or voyage commences from the time of the signing of the bill of lading issued upon the delivery of the goods, and thereunder the carrier can not avoid his liability as such, even though the goods are not actually on their passage at the time of a loss; but, **these provisions do not affect the result here.**"

To the same effect is *A. T. & S. F. R. Co. v. Harold*, 241 U. S. 371.

II.

As the twenty-seven bills of lading were issued without the receipt by carrier of any wheat whatever, and upon false and fraudulent representations of shipper, they were void under the provisions of the Interstate Commerce Law and an unbroken line of decisions of this Court.

On the demurrer to plaintiff's petition, the defendant necessarily raised the question as to the validity of the bills of lading; on the trial of the case in the trial court, the plaintiff in error objected to the introduction of any evidence under the petition, and objected to the introduction of the bills of lading in evidence on the ground that these bills of lading were void under the interstate commerce law. Later, in the course of proceedings, on the motion that the court render judgment for the defendant, and for a new trial, the defendant raised the question that the bills of lading were invalid and void under the interstate commerce law.

These bills of lading were made void by the Federal Interstate Commerce Act of February 4, 1887, as amended by the Act of March 2, 1889, and no consideration supported or could support them as contracts under federal law. Section 2 of the Interstate Commerce Act of February 4, 1887, chapter 104, 24 Stat. L. 379, provided that if any common carrier subject to the provisions of the act shall, directly or

indirectly, by any special rate, rebate, drawback or other device charge, demand, collect or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects or receives, from any other person or persons for doing for him or for them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful.

Section 3 provided that it shall be unlawful for any common carrier subject to the provisions of the act to make or give any undue or unreasonable preference or advantage to any particular person or locality or any particular description of traffic in any respect whatsoever.

Section 6 (as amended by the Act of March 2, 1889, chapter 382, section 1, 25 Stat. L. 855), provided that every common carrier subject to the provisions of this act shall print and keep open to public inspection schedules showing rates and fares and charges for the transportation of passengers and property which any common carrier has established and which are in force at the time upon its route. The schedules shall state the places between which property and passengers will be carried and shall contain the classi-

fication of freight in force, and shall state separately the terminal charges and any rules or regulations which in anywise change, affect or determine any part or the aggregate of such aforesaid rates and fares and charges. And when any such common carrier shall have established and published its rates, fares and charges in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, collect or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any services in connection therewith, than is specified in such published schedule of rates, fares and charges as may at the time be in force.

Section 10 (as amended by the Act of March 2, 1889, Chapter 382, Section 2, 25 Stat. L. 857) provided that any common carrier subject to the provisions of this act, or, whenever such common carrier is a corporation, any officer or agent thereof or any person acting for or employed by such corporation, who, by means of false billing, false classification, false weighing or false reporting of weight, or by any other device or means, shall knowingly and willfully assess, or shall willfully suffer or permit any person or persons to obtain transportation for property at less than the regular rates then established and in force on the line of transportation of such common carrier, shall be deemed guilty of a misde-

meanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine or imprisonment, or both, in the discretion of the Court, for such offense. And any person or any officer or agent of any corporation or company who shall deliver property for transportation to any common carrier, subject to the provisions of this act, or for whom as consignor or consignee any such carrier shall transport property, who shall knowingly and willfully, by false billing, false classification, false weighing, false representation of the contents of the package, or false report of weight, or by any other device or means, whether with or without the consent or connivance of the carrier, its agent or agents, obtain transportation for such property at less than the regular rates then established and in force on the line of transportation, shall be deemed guilty of fraud, which is hereby declared to be a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction, within the district in which such offense was committed, be subject for each offense to a fine or imprisonment, or both. And if any such person, or any officer or agent of any such corporation or company, shall, by payment of money or other thing of value, solicitation, or otherwise, induce any common carrier subject to the provisions of this act,

or any of its officers or agents, to discriminate unjustly in his, its or their favor as against any other consignor or consignee in the transportation of property, or shall aid or abet any common carrier in any such unjust discrimination, such person shall be deemed guilty of a dismemeanor and be subject, on conviction, to a fine or imprisonment, or both. Other sections created the Interstate Commerce Commission, provided for carrying out the Interstate Commerce Act, and the general scheme outlined.

The evidence in this case showed that sixty bills of lading were issued, each bill of lading describing a carload of wheat; but, that twenty-seven of these bills of lading were issued without receipt of the wheat at that time or at any other time; and, consequently, were fictitious bills and false and untrue in the statement as to the receipt of the wheat. No wheat was ever shipped under these bills of lading, and no service was ever rendered by the carrier or required by the shipper. The shipper never paid any freight charges nor gave any consideration to the carrier for the issuance of these contracts.

Relative to the purpose of this act, Chief Justice White in the case of *Railway v. Interstate Commerce Commission*, 200 U. S. 361, 50 L. Ed. 515, *521*, said:

> "It can not be challenged that the great purpose of the act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates,

was to secure equality of rates as to all, and to destroy favoritism, these last being accomplished by requiring the publication of tariffs, and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences, and all other forms of undue discrimination. To this extent and for these purposes the statute was remedial and is, therefore, entitled to receive that interpretation which reasonably accomplishes the great public purpose which it was enacted to subserve. That a carrier engaged in interstate commerce becomes subject as to such commerce to the commands of the statute, and may not set its provisions at naught whatever otherwise may be its power when carrying on commerce not interstate in character, can not in reason be denied. Now, in view of the positive command of the second section of the act, that no departure from the established rate shall be made, 'directly or indirectly', how can it in reason be held that a carrier may take itself from out the statute in every case by simply electing to be a dealer and transport a commodity in that character? For, of course, if a carrier has a right to disregard the published rates by resorting to a particular form of dealing, it must follow that there is no obligation on the part of a carrier to adhere to the rates, because doing so is merely voluntary. The all-embracing prohibition against either directly or indirectly charging less than the published rates shows that the purpose of the statute was to make the prohibition applicable to every method of dealing by a carrier by which the forbidden result could be brought

about. If the public purpose which the statute was intended to accomplish be borne in mind, its meaning becomes, if possible, clearer. What was that purpose? It was to compel the carrier, as a public agent, to give equal treatment to all."

And again, with reference to a special contract for a through rate not contained in the schedules filed with the Interstate Commerce Commission, the Court said, relative to the Act of February 4, 1887, as amended by the Act of March 2, 1889, in the case *Kansas City Southern R. Co. v. Albers Com. Co.*, 223 U. S. 573, 56 L. Ed. 556, *568*:

"Section 6 of the Interstate Commerce Act, as it existed at the time, laid upon every carrier subject to the provisions of the act the duty of filing with the Commission and publishing schedules of the rates to be charged for the transportation of property over its road, provided for changing and superseding such rates by new schedules so filed and published, and made it unlawful for such a carrier to depart from any rate so established and in force at the time. That Section also required connecting carriers, agreeing upon joint through rates, to file schedules thereof with the Commission, made similar provision for changing and superseding rates so established, and likewise prohibited any deviation from an established joint rate while remaining in force. Other sections contained provisions against unreasonable rates, unjust discriminations, undue preferences, and the like. The chief purpose of

the act was to secure uniformity of treatment to all, to suppress unjust discriminations and undue preferences, and to prevent special and secret agreements in respect of rates for interstate transportation, and to that end to require that such rates be established in a manner calculated to give them publicity, to make them flexible while in force, and to cause them to be unalterable save in the mode prescribed. In every substantial sense local rates and joint through rates were placed on the same level. Both required to be openly established and uniformly applied. True, the carriers were obliged to establish local rates, and were left free to agree upon joint through rates, or not, as they chose; but if they did agree thereon, the rates could become legally operative only by being established as prescribed in the act."

In the case of *Chicago & Alton R. Co. v. Kirby*, 225 U. S. 155, 56 L. Ed. 1033, the Court held that a shipper can not recover damages for a breach of the carrier's **special** agreement by which, contrary to the Act of February 4, 1887, Sections 3, 6 and the Act of February 19, 1903, it undertook, for the **regular** established joint through rate, to **expedite** a carload shipment of horses over its own lines so that it would reach the point of connection with the next carrier in time to be carried by a special fast stock train, although the shipper did not see or know that the established rates and schedules made no provision for such special service. The Court said:

> "The broad purpose of the Commerce Act was to compel the establishment of reasonable rates and the uniform application. That purpose would be defeated if sanction be given to a special contract by which any such advantage is given to a particular shipper as that contracted for by the defendant in error. To guarantee a particular connection and transportation by a particular train was to give an advantage or preference not open to all, and not provided for in the published tariffs."

Since the carrier could not exact or receive a charge under the guise of carrying merchandise when the service was not rendered, neither the payment of freight charges nor the receipt by the carrier of money or of any other consideration could have made the bills of lading valid. It is clear from the nature of the legal obligations imposed upon the carrier, and upon all other persons, that these bills of lading could not have had any validity at the time they were issued under the Federal law.

The case of *Southern Railway Co. v. Prescott,* 240 U. S., 632, 60 L. Ed. 836, was brought to recover for the loss of shoes that were destroyed by fire in 1913, while in possession of the railroad company. Whether the arrival of an interstate shipment at destination, the payment of freight by the consignee, his signature to a receipt for the shipment and his removal of a part of the goods, leaving the rest, with the carrier's

permission, to await his convenience in removal, discharged the carrier's contract set forth in the bill of lading, and created a new obligation as warehouseman governed by the local law, was the question involved. While the interstate commerce law as it existed in 1913 was the law discussed in the opinion, yet, the reasoning employed and the principles involved, we think, are applicable to the case at bar. The court said:

> "As the shipment was interstate, and the bill of lading was issued pursuant to the Federal act, the question whether the contract thus set forth had been discharged was necessarily a Federal question.
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> It is also clear that, with respect to the service governed by the Federal statute, the parties were not at liberty to alter the terms of the service as fixed by the filed regulations. This has been repeatedly held with respect to rates (Texas & P. R. Co. v. Mugg, 202 U. S. 242, 50 L. Ed. 1011, 26 Sup. Ct. Rep. 628; Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 652, 57 L. Ed. 683, 688, 33 Sup. Ct. Rep. 391; Boston & M. R. Co. v. Hooker, 233 U. S. 97, 112, 58 L. Ed. 868, 876, L. R. A. 1915B, 450, 34 Sup. Ct. Rep. 526, Ann. Cas. 1915D, 593; Louisville & N. R. Co. v. Maxwell, 237 U. S. 94, 59 L. Ed. 853, L. R. A. 1915E, 665, P. U. R. 1915C, 300, 35 Sup. Ct. Rep. 494), and the established principle applies equally to any stipulation attempting to alter the provisions as fixed by the published rules relating

to any of the services within the purview of the act. Chicago & A. R. Co. v. Kirby, 225 U. S. 155, 166, 56 L. Ed. 1033, 1038, 32 Sup. Ct. Rep. 648, Ann. Cas. 1914A, 501; Atchison, T. & S. F. R. Co. v. Robinson, 233 U. S. 173, 181, 58 L. Ed. 901, 905, 34 Sup. Ct. Rep. 556 This is the plain purpose of the statute in order to shut the door to all contrivances in violation of its provisions against preferences and discriminations. No carrier may extend 'any privileges or facilities', save as these have been duly specified. And as the terminal services incident to an interstate shipment are within the Federal act, and the conditions of liability while the goods are retained after notice of arrival are stipulated in the bill of lading under the filed regulations, the conditions thus fixed are controlling, and the parties can not substitute therefor a special agreement.

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The transaction at most could not be deemed to accomplish more than if the parties had agreed that, until such delivery, the goods should be held under a special contract, in lieu of the prescribed conditions, and this they could not effect without violating the act which governed the shipment. It could not be said, for example, that while under the filed regulations the railway company was to make a 'reasonable charge for storage' pending delivery, that it could agree with a particular shipper, or consignee, to hold gratuitously; nor could it alter the terms of its responsibility while the goods remained undelivered. The actual service in holding the goods

continued, and we must look to the bill of lading to determine the legal obligations attaching to that service.

Viewing the contract set forth in the bill of lading as still in force, the measure of liability under it must also be regarded as a Federal question. As it has often been said, the statutory provisions manifest the intent of Congress that the obligation of the carrier with respect to the services within the purview of the statute shall be governed by uniform rule in the place of the diverse requirements of state legislation and decisions. Adams Exp. Co. v. Croninger, 226 U. S. 491, 506, 509, 510, 57 L. Ed. 314, 320-322, 44 L. R. A. (N. S.) 257, 33 Sup. Ct. Rep. 148; Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657, 672, 57 L. Ed. 690, 695, 33 Sup. Ct. Rep. 397; Boston & M. R. Co. v. Hooker, 233 U. S. 97, 112, 58 L. Ed. 868, 876, L. R. A. 1915B, 450, Ann. Cas. 1915D, 593; Missouri, K. & T. R. Co. v. Harris, 234 U. S. 412, 420, 58 L. Ed. 1377, 1382, L. R. A. 1915E, 942, 34 Sup. Ct. Rep. 790; Charleston & W. C. R. Co. v. Varnville Furniture Co., 237 U. S. 597, 603, 59 L. Ed. 1137, 1139, 35 Sup. Ct. Rep. 715; Cleveland C. C. & St. L. R. Co. v. Dettlebach, *supra*; New York P. & N. R. Co. v. Peninsula Produce Exch., 240 U. S. 34, *ante*, 511, 36 Sup. Ct. Rep. 230. And the question as to the responsibility under the bill of lading is none the less a Federal one because it must be resolved by the application of general principles of the common law. Adams Exp. Co. v. Croninger and Missouri, K. & T. R. Co. v. Harriman, *supra*."

The case of *Railway Co. v. Blish Milling Co.*, 241 U. S. 190, 60 L. Ed. 948, involved a shipment moving May 13, 1910. The general principles discussed in this case, we think, are applicable to the case at bar. The question presented was, whether a stipulation in the bill of lading for an interstate shipment requiring claims for damages or misdelivery to be presented within four months after a reasonable time for delivery had elapsed, could be waived by the parties. The Court said:

> "But the parties could not waive the terms of the contract under which the shipment was made pursuant to the Federal act; nor could the carrier by its conduct give the shipper the right to ignore these terms which were applicable to that conduct, and hold the carrier to a different responsibility from that fixed by the agreement made under the published tariffs and regulations. A different view would antagonize the plain policy of the act and open the door to the very abuses at which the act was aimed. Chicago & A. R. Co. v. Kirby, 225 U. S. 155, 166, 56 L. Ed. 1033, 1038, 32 Sup. Ct. Rep. 648, Ann. Cas. 1914A, 501; Kansas City Southern R. Co. v. Carl, *supra*; Atchison, T. & S. F. R. Co. v. Robinson, 233 U. S. 173, 181, 58 L. Ed. 901, 905, 34 Sup. Ct. Rep. 556; Southern R. Co. v. Prescott, *supra*. We are not concerned in the present case with any question save as to the applicability of the provision, and its validity, and as we find it to be both applicable and valid, effect must be given to it."

The case of *Railway v. Rankin*, 241 U. S. 319, 60 L. Ed. 1022, involved on interstate bill of lading limiting the value of a shipment of horses. The Court held that the rights and liabilities of the parties to an interstate railway shipment depend upon Federal legislation, the bill of lading, and common law rules as accepted and applied in Federal tribunals.

The case of *Railway v. Carl*, 227 U. S. 639, 57 L. Ed. 683, was brought to recover for the loss of a shipment in 1907, from Lawton, Oklahoma, to Gentry, Arkansas, under a bill of lading limiting the liability of the carrier. The Court said:

> "To permit such a declared valuation to be overthrown by evidence *aliunde* the contract, for the purpose of enabling the shipper to obtain a recovery in a suit for loss or damage in excess of the maximum valuation thus fixed, would both encourage and reward under-valuations, and bring about preferences and discriminations forbidden by the law. Such a result would neither be just nor conducive to sound morals or wise policies. The valuation the shipper declares determines the legal rate where there are two rates based upon valuation. He must take notice of the rate applicable, and actual want of knowledge is no excuse. The rate, when made out and filed, is notice, and its effect is not lost, although it is not actually posted in the station. Texas & P. R. Co. v. Mugg, 202 U. S. 242, 50 L. Ed. 1011, 26 Sup. Ct. Rep. 628; Chicago & A. R. Co. v.

Kirby, 225 U. S. 155, 56 L. Ed. 1033, 32 Sup. Ct. Rep. 648.

It would open a wide door to fraud and destroy the uniform operation of the published tariff rate sheets. When there are two published rates, based upon difference in value, the legal rate automatically attaches itself to the declared or agreed value. Neither the intentional nor accidental misstatement of the applicable published rate will bind the carrier or shipper. The lawful rate is that which the shipper must pay. The shipper's knowledge of the lawful rate is conclusively presumed, and the carrier may not be required to surrender the goods carried upon the payment of the rate paid, if that was less than the lawful rate, until the full legal rate has been paid. Texas & P. R. Co. v. Mugg, *supra*. Nor is the carrier liable for damages resulting from a mistake in quoting a rate less than the full published rate. Illinois C. R. Co. v. Henderson Elevator Co., 226 U. S. 441; *ante*, 290, 33 Sup. Ct. Rep. 176. Nor can a carrier legally contract with a particular shipper for an unusual service unless he make and publish a rate for such service equally open to all. Chicago & A. R. Co. v. Kirby, *supra*."

The case of *Railway v. Robinson*, 233 U. S. 173, 58 L. Ed. 901, was brought to recover for damages to a race horse, which it was claimed, was shipped under a special oral contract. The Court held:

> "A special contract for an interstate railway shipment without limitation of the carrier's liability to an agreed value can have no binding force where the carrier's published tariffs on file with the Interstate Commerce Commission graduate the rates according to declared value and limit the carrier's liability accordingly, since the shipper as well as the carrier, is bound to take notice of the filed tariff rates, and so long as they remain operative they are conclusive as to the rights of the parties in the absence of facts or circumstances showing an attempt at rebating or false billing."

The Court said:

> "To maintain the supremacy of such oral agreements would defeat the primary purposes of the interstate commerce act, so often affirmed in the decisions of this Court, which are to require equal treatment of all shippers and the charging of but one rate to all, and that the one filed as required by the act."

Under this provision of the Federal statutes relating to interstate commerce as they were when the bills of lading involved in this action were executed, in June, 1900, no carrier could favor any person by the issuance of a valid and binding contract or bill of landing without receipt of the freight described therein. Money or other consideration could not buy

a bill of lading, the carrier could not sell its obligation to deliver freight without first having received the goods for carriage. Liability in this case is predicated on the theory that the plaintiff in error, defendant below, was required by the terms and conditions of its bill of lading to carry from Kansas City, Missouri, and deliver at Galveston, Texas, certain quantities of wheat, and its failure to do so, although it had never received the wheat for carriage, made it liable to the plaintiffs below for the value. To permit shippers or their assignees to recover on the ground stated would open a broad and ample way for the payment of rebates and for other unlawful practices which it was the design of the interstate commerce law to prevent, and might in its results work a repeal of the essential features of that legislation.

It was not within the scope of authority of the agent of the carrier to issue bills of lading where no property had been received for transportation, and to bind the railroad on contracts which it had no power or authority to execute. The business of the carrier is to carry goods and freight, which business, and the scope of its activity, is necessarily known to the commercial world. The limitations and authority of its agents are known to all persons. It cannot exact revenues except in accordance with its printed schedules, and it cannot make a charge except for

services rendered, nor render services other than those provided for in its regularly promulgated tariffs, and within the scope of its chartered authority as a common carrier.

In the case of *Pollard et al. v. Vinton,* 15 Otto 7, 105 U. S. 7, 26 L. Ed. 998, the defendant was the owner of a steamboat. A bill of lading had been issued, signed by the agent of the owner and delivered to Dickinson, Williams & Co. They immediately drew a draft on the plaintiff in error and attached the bill of lading. No goods were received or shipped, as stated in the bill of lading, the statement to that effect being untrue. Suit was brought on the bill of lading for the non-delivery of the goods described therein. The Court said:

> "This authority to execute and deliver bills of lading has two limitations, namely: They could only be delivered to shippers, and they could only be delivered for freight shipped on the steamboat.
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> "Before the power to make and deliver a bill of lading could arise, some person must have shipped goods on the vessel. Only then could there be a shipper, and only then could there be goods shipped. In saying that we do not mean that the goods must have been actually placed on the deck of the vessel. If they came within control and custody of the officers of the boat for the purpose of shipment, the contract of carriage had commenced, and the evidence of it in the form of a bill of lading would be binding.

But without such a delivery there was no contract of carrying, and the agents of defendant had no authority to make one.

"They had no authority to sell cotton and contract for delivery. They had no authority to sell bills of lading. They had no power to execute these instruments and go out and sell them to purchasers. No man had a right to buy such a bill of lading of them, who had not delivered them the goods to be shipped.

"Such is not only the necessary inference from the definition of the authority under which they acted, as found in the bill of exceptions, but such would be the legal implication if their relation to defendant had been stated in more general terms. The result would have been the same if it had been merely stated that they were the shipping agents of the owner of the vessel at that point."

In the case of *Friedlander et al. v. Railroad,* 130 U. S. 416, 32 L. Ed. 991, suit was brought by the plaintiffs in error to recover for the non-delivery of certain cotton named in an alleged bill of lading, of which they claimed to be assignees for value. No cotton had been delivered to the railroad company for shipment and the statement in the bill of lading to the effect that the cotton had been so delivered, was untrue.

The Court said:

"The inference to be drawn from the state-

ment is that no cotton whatever was delivered for transportation to the agent at Sherman station. The question arises, then, whether the agent of the railroad company at one of its stations can bind the company by the execution of a bill of lading for goods not actually placed in his possession, and its delivery to a person fraudulently pretending, in collusion with such agent, that he had shipped such goods in favor of a party without notice, with whom, in furtherance of the fraud, the pretended shipper negotiates a draft with the false bill of lading attached. Bills of exchange and promissory notes are representatives of money, circulating in the commercial world as such, and it is essential, to enable them to perform their peculiar functions, that he who purchases them should not be bound to look beyond the instrument, and that his right to enforce them should not be defeated by anything short of bad faith on his part. But bills of lading answer a different purpose and perform different functions. They are regarded as so much cotton, grain, iron or other articles of merchandise, in that they are symbols of ownership of the goods they cover. And as no sale of goods lost or stolen, though to a *bona fide* purchaser for value, can divest the ownership of the person who lost them or from whom they were stolen, so the sale of the symbol or mere representative of the goods can have no such effect, although it sometimes happens that the true owner, by negligence, has so put it into the power of another to occupy his position ostensibly as to estop him from asserting his right as

against a purchaser, who has been misled to his hurt by reason of such negligence. Shaw v. Railroad Co. (Merchants Nat. Bank), 101 U. S. 557, 563, 25 L. Ed. 892, 893; Pollard v. Vinton, 105 U. S. 7, 8, 26 L. Ed. 998, 999; Gurney v. Behrend, 3 El. & Bl. 633, 634. It is true that while not negotiable, as commercial paper is, bills of lading are commonly used as security for loans and advances, but it is only as evidence of ownership, special or general, of the property mentioned in them, and of the right to receive such property at the place of delivery.

Such being the character of a bill of lading, can a recovery be had against a common carrier for goods never actually in its possession for transportation, because one of its agents, having authority to sign bills of lading, by collusion with another person, issues the document in the absence of any goods at all?

It has been frequently held by this Court that the master of a vessel has no authority to sign a bill of lading for goods not actually put on board the vessel, and, if he does so, his act does not bind the owner of the ship, even in favor of an innocent purchaser (The Freeman v. Buckingham, 59 U. S., 18 How. 182, 191, 15 L. Ed. 341, 345; The Lady Franklin, 75 U. S., 8 Wall. 325, 19 L. Ed. 455; Pollard v. Vinton, 105 U. S. 7, 26 L. Ed. 998). And this agrees with the rule laid down by the English courts (Lickbarrow v. Mason, 2 T. R. 77; Grant v. Norway, 10 C. B. 665; Cox v. Bruce, L. R., 18 Q. B. Div. 147). 'The receipt of the goods,' said Mr. Justice Miller, in *Pollard v. Vinton, supra*, 'lies at the foundation

of the contract to carry and deliver. If no goods are actually received, there can be no valid contract to carry or to deliver.' And the doctrine is applicable to transportation contracts made in that form by railway companies and other carriers by land, as well as carriers by sea,' as was said by Mr. Justice Matthews in *Iron Mountain Railway v. Knight*, 122 U. S. 79, 87, 30 L. Ed. 1077, 1080, he adding, also: 'If Porter (the agent) had never delivered to the plaintiff in error any cotton at all to make good the 525 bales called for by the bills of lading, it is clear that the plaintiff in error would not be liable for the deficiency. This is well established by the cases of The Freeman v. Buckingham, 59 U. S., 18 How. 182, 15 L. Ed. 341, and Pollard v. Vinton, 105 U. S. 7, 26 L. Ed. 998.'

It is a familiar principle of law that where one of two innocent parties must suffer by the fraud of another the loss should fall upon him who enabled such third person to commit the fraud; but nothing that the railroad company did or omitted to do can be properly said to have enabled Lahnstein to impose upon Friedlander & Co. The company not only did not authorize Easton to sign fictitious bills of lading, but it did not assume authority itself to issue such documents except upon the delivery of the merchandise. Easton was not the company's agent in the transaction, for there was nothing upon which the agency could act. Railroad companies are not dealers in bills of exchange, nor in bills of lading; they are carriers only, and held to rigid responsibility as such. Easton, disregarding the

object for which he was employed, and not intending by his act to execute it, but wholly for a purpose of his own and of Lahnstein, became *particeps criminis* with the latter in the commission of the fraud upon Friedlander & Co.; and it would be going too far to hold the company, under such circumstances, estopped from denying that it had clothed this agent with apparent authority to do an act so utterly outside the scope of his employment and of its own business. The defendant can not be held on contract as a common carrier in the absence of goods, shipment and shipper; nor is the action maintainable on the ground of tort. 'The general rule,' said Willes, J., in Barwick v. English Joint Stock Bank, L. R. 2 Exch. 259, 'is that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved.' See, also, Limpus v. London, General Omnibus Co., 1 Hurl. & C. 526. The fraud was in respect to a matter within the scope of Easton's employment or outside of it. It was not within it, for bills of lading could not be issued for merchandise delivered; and being without it, the company, which derived and could derive no benefit from the unauthorized and fraudulent act, can not be made responsible (British Mut. Banking Co. v. Charnwood Forest R. Co., L. R., 18 Q. B. Div. 714).

The law can punish roguery, but can not always protect a purchaser from loss, and so fraud perpetrated through the device of a false bill

of lading may work injury to an innocent party, which can not be redressed by a change of victim."

See, also, *Shaw v. Bank*, 101 U. S. 557; *Railway v. Knight*, 122 U. S. 79; *Railway v. McFadden*, 154 U. S. 155; *10 Corpus Juris*, 197.

We, therefore, contend that the bills of lading involved in this case were void under the provisions of the Interstate Commerce law, and the repeated decisions of this Court, and that this judgment, based upon such bills of lading, is in violation of the Interstate Commerce law and constitutes a direct burden upon interstate commerce.

III.

The Supreme Court of Kansas erred in holding that the defendant railway was estopped by its answer to the petition and the adjudication of that court in its favor as to certain points in former appeals, from asserting its rights under the Federal statutes which were at all times "raised" and relied upon, and never waived, and could not be waived or set aside, either by the parties or by the Court.

The Supreme Court of Kansas, in deciding this case, held:

"The proceedings considered, and held that the defendant is estopped by its answer to the

petition and by adjudication of this Court in its favor in former appeals from asking that the rights of the parties be now determined by Federal statutes claimed to be applicable."

The petition filed by the plaintiffs below in this action (Tr., p. 3) set out the facts that bills of lading had been issued by the defendant below to one J. K. Davidson, containing receipts for certain quantities of wheat to be shipped from Kansas City, Missouri, to Galveston, Texas; that these bills of lading had been issued without receipt of the wheat and the statements contained in such bills were false and untrue, and no wheat had ever been shipped under them; that Davidson had attached drafts to the bills of lading and had sent these drafts by mail to Galveston, Texas, and these drafts had been cashed by the plaintiffs below; that, relying upon the statements contained in the bills of lading, these plaintiffs had cashed the drafts, and since no wheat had been received, they were thereby damaged in the sums that they had advanced. The defendant below filed a general demurrer to the plaintiffs' petition and this demurrer was overruled by the trial court. The defendant then filed its answer in the case, setting up various defenses. The plaintiffs filed a general demurrer to this answer, which demurrer was sustained. An appeal was perfected to the Supreme Court of the state, and both of these rulings of the

lower court, the first overruling the demurrer to plaintiff's petition, and the second, sustaining the demurrer to defendant's answer, came on for determination. The Supreme Court of Kansas (78 Kan. 758) held that the defendant's demurrer to the petition was rightfully overruled, but reversed the case on the ruling of the trial court sustaining plaintiffs' demurrer to defendant's answer and remanded the case with directions to overrule the demurrer.

Plaintiffs then filed a reply and the defendant filed a general demurrer to this reply, which demurrer the Court sustained. Plaintiffs then appealed to the Supreme Court of the State, and this ruling of the trial court was set aside and the case remanded with directions to overrule the demurrer to the reply, and proceed in accordance with the views expressed in the opinion (84 Kan. 479, 489). The case was then tried and judgment rendered against the defendant. An appeal was taken to the Supreme Court of Kansas from this judgment, and the judgment affirmed (98 Kan. 225, Tr., p. 84).

From the foregoing it is seen that the first two appeals to the Supreme Court of Kansas did not result in a final judgment, and these decisions would not sustain a writ of error from the United States Supreme Court.

The case of *Haseltine v. Central National Bank*, 183 U. S. 132, 46 L. Ed. 118, was an action instituted in the Circuit Court of Greene County, Missouri. The Su-

preme Court of Missouri reversed the judgment of the Circuit Court. A writ of error was then issued to the Supreme Court of Missouri from the United States Supreme Court, to review this judgment, reversing the judgment of the lower court. A motion to dismiss was granted, and this Court said:

> "We have frequently held that the judgment reversing that of the court below and remanding the case for further proceedings is not one to which a writ of error will lie."

In the case of *Schlosser v. Hemphill,* 198 U. S. 173, 49 L. Ed. 1000, it was held that a judgment of the highest state court reversing the decree of the trial court in an equity case and remanding the case for further proceedings in harmony with its opinion, is not final in such a sense as will sustain a writ of error from the Supreme Court of the United States.

To the same effect are the following cases: *Mo. & Kan. Ry. Co. v. Olathe,* 222 U. S. 185, 56 L. Ed. 155; *Louisiana Nav. Co. v. Oyster Com. of Louisiana,* 226 U. S. 99, 57 L. Ed. 138; *State of Washington ex rel. v. Superior Court of Washington,* 243 U. S. 251, 61 L. Ed. 702.

Hence the present proceedings in error afford the first opportunity that was open to defendant, to secure a review of the decisions of the State Supreme Court.

The decisions of the State Supreme Court on the

first and second appeals of this case are not binding upon this Federal Supreme Court, and do not establish the law of the case in the Federal Supreme Court.

The case of *Zeckendorf v. Steinfeld*, 225 U. S. 445, 56 L. Ed. 1156, was a suit brought in the District Court for Pima County, Territory of Arizona. The District Court on the first trial found in favor of the plaintiff. This judgment was reversed by the Supreme Court of Arizona and the case sent back for further proceedings and further findings. On the second trial, judgment was rendered by the trial court. An appeal was taken to the Supreme Court of Arizona, where the judgment was affirmed; both parties appealed to the Supreme Court. The Court said, relative to the effect of the first decision of the Arizona Supreme Court:

> "Whatever might be the holding of the Supreme Court of Arizona as to the effect of this decision upon its own judgment and that of the District Court, the case reached this Court for the first time upon the present appeal, and certainly the holding of the Supreme Court of Arizona at any of the stages of the case prior to this appeal would not be the law of the case for this Court, United States v. Denver & R. G. Co., 191 U. S. 84, 93, 48 L. Ed. 106, 109, 24 Sup. Ct. Rep. 33"

The case of *Messinger v. Anderson*, 225 U. S. 436, 56 L. Ed. 1152, reached the Supreme Court of the

United States on a writ of *certiorari* to the United States Circuit Court of Appeals for the Sixth Circuit to review a judgment which, on a third writ of error, affirmed a judgment of the Circuit Court for the Northern District of Ohio. The Court held that the phrase, "law of the case", as applied to the effect of a decision of an appellate court in an earlier appeal in the same case, merely expresses, in the absence of statute, the practice of courts generally to refuse to reopen what has been decided, and not a limit to their power. A prior decision of a Federal circuit court of appeals is not the law of the case for the Supreme Court when reviewing a later decision of the former court in the same case.

In the case of *Panama R. Co. v. Napier Shipping Co.*, 166 U. S. 280, 41 L. Ed. 1004, on writ of *certiorari* to the Circuit Court of Appeals, the Court held:

> "The entire case is open for examination by this Court when in the exercise of its supervisory jurisdiction it issues a writ of *certiorari* to bring up the whole record of the case after an opinion by the Circuit Court of Appeals affirming a decree for damages, although this was the second appeal to that court and the Circuit Court of Appeals may have been limited to the mere question of damages because on a prior appeal it had decided the merits of the case by reversing a decree of dismissal, and had remanded the case for an assessment of damages."

In the case of *United States v. Denver & R. G. R. Co.*, 191 U. S. 84, 48 L. Ed. 106, in error to the Supreme Court of the Territory of New Mexico, this Court said:

> "While the Supreme Court of New Mexico upon this second writ of error may have considered itself bound by its decision upon the question here involved upon the first writ as the law of the case, we are not ourselves restrained by the same limitation. As its judgment upon the first writ was merely for a reversal of the court below, and for a new trial, such judgment, not being final, could not be made the subject of a writ of error from this court. Upon the present writ, however, we are at liberty to revise the action of the court below in both instances."

The Kansas Supreme Court, in its opinion in this case, said (Tr., p. 85):

> "Having appealed from the judgment of the District Court overruling the demurrer to the petition, and having kept silent then with respect to the application of the Federal law, the action of this Court is an adjudication of the law of the case, binding on the defendant. The defendant can not be allowed to settle the law of the case piecemeal any more than it can be allowed to settle the facts in that way (Estes v. Zinc Co., 97 Kan. 774, 156 Pac. 758). Besides this, the defendant chose to defend the action on the express ground, pleaded *in extenso*, that the bills of lading were governed by the law of the State of Missouri and that the rights and duties

of the parties in respect to the matters complained of in the petition were defined by the Missouri law. The defendant presented this subject to this court on the first appeal and procured the following adjudication in its favor:

'In an action against a common carrier based upon bills of lading, involving no question with respect to the right of the carrier to limit its common-law liability, the rights and obligations of the parties are to be determined by the law of the place where the contract was made.

In an action against a common carrier to recover moneys advanced on the faith of bills of lading issued by the agents of the carrier without the actual receipt of the property, an answer which alleges that the bills were executed and delivered in the State of Missouri, that when they were issued the statutes of that state made it unlawful for a common carrier to issue bills of lading without the actual receipt of the property, and that the Supreme Court of Missouri has held and still holds, in construing the statute, that all such bills of lading are absolutely void and that no action can be maintained thereon by any holder or assignee, states a good defense as against a demurrer' (Railway Co. v. Hutchings, 78 Kan. 758, Syl. Sections 3, 4, 99 Pac. 230).

This adjudication was binding on the defendant and on the trial court, and the defendant could not at the subsequent trial, without asking permission to change the issue and while still asserting that the Missouri law governed, shift its defense to some other law. Having been defeated on the theory of the litigation which it proposed and which it induced the Court to ac-

cept, the defendant is in no position to ask this Court to adopt a new theory according to which the propriety of the judgment shall be tested. It is estopped by its pleading and by the adjudications of this Court in its favor based on that pleading."

IV.

The Federal question was in the case from its inception, and was necessarily raised by the petition itself as well as by the answer and other pleadings of the defendant. Neither the raising of other questions nor their decision by the Supreme Court of Kansas, whether in favor of or against the defendant, could, by estoppel, waiver, or otherwise, justify that court in refusing to adjudicate the case in accordance with and as required by the Interstate Commerce Act as construed by the decisions of this Court.

While the State Supreme Court may have felt itself bound to follow its former decisions in this case, yet, such decisions are not controlling when the case reaches the Federal Supreme Court; nor do we think the defendant below is estopped by the pleadings and by the adjudications of the State Court. If the Federal statutes and adjudications are controlling under the facts of this case and fix the rights and liabilities of the parties, the pleading of the Missouri statute in the answer of the defendant was the pleading of an immaterial fact and was surplusage, and the

Court should have rejected this part of the pleading as surplusage.

It is alleged in plaintiffs' petition, first cause of action (Tr., pp. 5, 6), that on June 13, 1900, the defendant issued its instrument in writing commonly called a bill of lading, whereby it is stated that it had received of J. K. Davidson & Co., for shipment from Kansas City, Missouri, to Galveston, Texas, one car of bulk wheat containing 66,000 pounds, and that such wheat was loaded in car of the defendant No. 2361, which car of wheat was to be transported by the defendant from Kansas City, Missouri, to Galveston, Texas, and delivered to the order of J. K. Davidson & Co. A copy of the bill of lading was attached. Thereupon, it is alleged, this instrument in writing commonly called a bill of lading, was assigned by J. K. Davidson & Co. to the persons then doing business as Hutchings, Sealy & Company, and delivered to such persons at Galveston, Texas, who, upon the faith and strength of the recitals contained in this bill of lading and in reliance thereon, and in reliance upon said bill of lading so issued in pursuance of said course of business, did then and there advance and pay to J. K. Davidson & Co. the sum of $660.00. These plaintiffs aver that in truth and in fact the recitals contained in the bill of lading so issued by the defendant as hereinbefore pleaded were false, and that in truth and in fact 66,000 pounds of wheat were

not loaded in car No. 2361 of the defendant company by J. K. Davidson; nor was any part thereof loaded in said car, or in any other car of the defendant railway company; nor was such wheat ever received by the defendant from J. K. Davidson & Company; nor was such wheat transmitted from Kansas City, Missouri, and delivered to the persons then doing business as Hutchings, Sealy & Co., at Galveston, Texas, or to any other peson in their behalf; nor was such wheat ever delivered by J. K. Davidson & Company to the persons then doing business as Hutchings, Sealy & Company. These plaintiffs first learned of the untruthfulness of the statements in said bill of lading, on June 21, 1900. Then followed a statement with like allegations in twenty-six other causes of action. On the first appeal of this case to the Kansas Supreme Court, the Court said (78 Kan. 763):

> "In the petition in this case there are averments which are sufficient to set up a cause of action for a breach of contract, and there are averments that the bills were issued fraudulently, and that by reason thereof the plaintiffs suffered damage; but these latter may be regarded as merely statements of the breach of the contract, for it sufficiently appears that the action is solely to recover the amount advanced upon the faith of the statements contained in the contracts. The doctrine is well settled that where a petition contains a good cause of action the addition of words or averments which are appropriate to a

cause of action for a wrong will not change the action from contract to tort (2 Beach, Mod. Law of Cont., Sec. 1679, note). And in case of doubt the courts are inclined against construing the pleading as embodying a cause of action for a tort (Goodwin *et al.* v. Griffis, 88 N. Y. 629; Austin v. Rawdon, 44 N. Y. 63). This being an action on contract, the five-year statute applies; and both actions being on contract, and on the same contracts—to recover the moneys advanced on the faith of the bills of lading—they are not inconsistent."

In the courts of Kansas pleadings must contain a statement of facts constituting the cause of action or defense (Sec. 5685, Laws of Kansas, 1909), and the pleader is not required to state under what law he claims his cause of action falls. In the case of *Cockrell v. Henderson,* 81 Kan. 335, it was said:

> "And generally, if he should make such a statement and be mistaken, his statement would be immaterial. All that a plaintiff is now required to do is to state the facts constituting his cause of action in ordinary and concise language and without repetition."

In the case of *Light Company v. Waller,* 65 Kan. 514, 522, it was said that if a party should make an admission of the existence of a fact in his brief without regard to what the record shows, there would be

nothing about such an admission that would operate as an estoppel.

Now, if the Federal statutes fix the rights of the parties, it must necessarily follow that the Missouri statutes do not, and that the allegations relative to what the Missouri statutes were or what the Missouri law was, were immaterial and surplusage. If the pleading of these laws be considered as the pleading of a fact; yet, their effect upon the case and their materiality was no greater than that of pleading any other fact not bearing upon the issues, and which was not material to a determination of the case.

The case of *Railway v. Wulf*, 226 U. S. 570, 57 L. Ed. 355, was brought to recover damages for the death of an employe of the railroad, and the petition set up the Kansas statutes and claimed liability under such statutes. Afterwards, liability was claimed under the Federal statutes. It was urged that plaintiff could not shift after the statutes of limitations had run, from a cause of action under the Kansas statute to one under the Federal statute. This Court in passing on this question, said:

> "It is true the original petition asserted a right of action under the laws of Kansas, without making reference to the act of Congress. But the Court was presumed to be cognizant of the enactment of the Employers' Liability Act, and to know that, with respect to the responsibility of interstate cariers by railroad to their employes

injured in such commerce after its enactment, it had the effect of superseding state laws upon the subject (Second Employers' Liability Cases [Mondou v. New York, N. H. & H. R. R. Co.], 223 U. S. 1, 53, 56 L. Ed. 327, 347, 38 L. R. A. [N. S.] 44, 32 Sup. Ct. Rep. 169). Therefore the pleader was not required to refer to the Federal act, and the reference actually made to the Kansas statute no more vitiated the pleading than a reference to any other repealed statute would have done."

The Kansas Supreme Court was confronted every time this case was before it for consideration with the fact that this action was founded upon bills of lading providing for the shipments of wheat from Kansas City, Missouri, to Galveston, Texas; and that these bills of lading had been issued by some agent of the railroad company without having received the wheat at the time they were issued, or at any other time; and, therefore, that the action was controlled by the Federal law. The Supreme Court of Kansas found that under Federal decisions there could be no recovery—but applied the Kansas doctrine. There was no right of recovery unless given by the Interstate Commerce Act and the Federal decisions, so that the Federal question was necessarily in the case from its very inception. The Court was cognizant of such law and knew, and was bound to know, that the Missouri statutes and the law had

been superseded by the Federal law, and that all the allegations in plaintiffs' answer as to what the law of Missouri was were surplusage.

It is, perhaps, to be regretted, but it is frequently true, that erroneous theories are frequently presented in the briefs of counsel, and counsel frequently fail to cite controlling cases or precedents. Erroneous conclusions frequently are drawn from admitted facts, all of which have a tendency, no doubt, to lead courts into erroneous decisions. Yet, notwithstanding all this, all material facts in this action have been before the Court from the inception of the case, on each and every hearing when this case was considered; and, while also there may have been immaterial facts and erroneous theories and unsound conclusions before the Court, which may have had a tendency to introduce confusion and error, yet the responsibility for determining correct principles of law must lie solely with the courts, and the doctrine of estoppel can not be applied to arguments produced in briefs of parties. Law is not elusive and migratory, requiring a seizure by the pleader in order to stabilize and fix it for the purpose of an application in a case. It would seem to be an absurdity to say that the parties by pleading statutes and forming issues thereunder might by such process select and determine the law that would apply to their transactions; and, by refraining from calling the attention

of the Court to the existence of the proper statutes or proper principles of law involved, be permitted thereby to create laws that would measure their rights and liabilities. Yet, such would be the result that would follow if, by pleading the Missouri statutes and a set of legal principles not applicable to the facts involved in this action, the defendant's liability would be held to be fixed by the laws so pleaded and not by the statutes regularly enacted by legislative authority. To state this proposition is to refute it.

It is held in the case of *Southern R. Co. v. Prescott*, 240 U. S. 632, 60 L. Ed. 836, that a carrier and a shipper of an interstate shipment may not, by special agreement, alter the conditions specified in the bill of lading governing the carrier's liability when a shipment is not removed within forty-eight hours after notice to the consignee of its arrival, which conform to the carrier's published regulations. In the opinion the Court said (page 839):

> "It is also clear that, with respect to the service governed by the Federal statute, the parties were not at liberty to alter the terms of the service as fixed by the filed regulations. This has repeatedly been held with respect to rates (Texas & P. R. Co. v. Mugg, 202 U. S. 242, 50 L. Ed. 1011, 26 Sup. Ct. Rep. 628; Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 652, 57 L. Ed. 683, 688, 33 Sup. Ct. Rep. 391; Boston & M. R. Co. v. Hooker, 233 U. S. 97, 112, 58 L. Ed. 868,

876, L. R. A. 1915B, 450, 34 Sup. Ct. Rep. 526, Ann. Cas. 1915D, 593; Louisville & N. R. Co. v. Maxwell, 237 U. S. 94, 59 L. Ed. 853, L. R. A. 1915E, 665, P. U. R. 1915C, 300, 35 Sup. Ct. Rep. 494), and the established principle applies equally to any stipulation attempting to alter the provisions as fixed by the published rules relating to any of the services within the purview of the act. Chicago & A. R. Co. v. Kirby, 225 U. S. 155, 166, 56 L. Ed. 1033, 1038, 32 Sup. Ct. Rep. 648, Ann. Cas. 1914A, 501; Atchison, T. & S. F. R. Co. v. Robinson, 233 U. S. 173, 181, 58 L. Ed. 901, 905, 34 Sup. Ct. Rep. 556. This is the plain purpose of the statute in order to shut the door to all contrivances in violation of its provisions against preferences and discriminations. No carrier may extend 'any privileges or facilities', save as these have been duly specified. And as the terminal services incident to an interstate shipment are within the Federal act, and the conditions of liability while the goods are retained after notice of arrival are stipulated in the bill of lading under the filed regulations, the conditions thus fixed are controlling, and the parties cannot substitute therefor a special agreement."

We think, perhaps, that the substance of the Court's remarks is that the Federal question was not presented in proper time, for the Court said:

"This adjudication was binding on the defendant and on the trial court, and the defendant

could not at the subsequent trial, without asking permission to change the issue, and while still asserting that the Missouri laws governed, shift its defense to some other law."

But this statement disregards the fact that the Federal law controlled, and no other law was applicable **and it was the duty of the trial court and of the Supreme Court of Kansas to know and apply and enforce the Federal law whether either party** raised the point or insisted on it or not. The Supreme Court of Kansas expressly found that under **Federal decisions** there could be no recovery, but applied the **Kansas** decisions instead, and held plaintiff could recover. The facts in this case which determine what law controls have been apparent from the inception of the action, and conclusively determine what law would be applicable. The plaintiffs' petition alleged the issuance of these false bills of lading, their assignment to the plaintiffs, and the advancement of money on the faith and strength of the false representation and statements contained in these bills of lading. The general demurrer filed by the defendant to the petition raised the sufficiency in law of these allegations of fact. If the Federal statutes and decisions were applicable and precluded a recovery under these facts, then the Federal question was raised at that time. When the defendant answered to the

petition of the plaintiffs and the plaintiffs filed a general demurrer to such answer, again the whole subject was up, and the sufficiency of the petition was an issue. At the threshold of the trial (Tr., p. 82) the defendant objected to the introduction of any testimony, on the ground that the petition was insufficient under Federal law, and thus raised again the question. When the bills of lading themselves were introduced in evidence, objection was made to these bills of lading on the ground that they were void under Federal law, and the question again was raised. It was raised on the motion of the defendant below for judgment on the evidence and the findings of the Court, and again on its motion for a new trial. The Supreme Court of Kansas, on the first hearing, held the petition of the plaintiffs to be sufficient, and thereby determined the Federal question adversely to the defendant; and on the second hearing the same question was necessarily involved and determined by the Court. No amendment of pleadings was necessary to be made by the defendant, and it was not necessary to allege further facts; and, indeed, there seemed to be a superabundance of facts in these pleadings on the part of both parties.

The case of *Atchison, T. & S. F. R. Co. v. Harold,* 241 U. S. 371, 60 L. Ed. 1050, was an action based on a bill of lading issued before receipt of the freight. It was claimed that a Federal question had not

been decided since it was not asserted or relied upon except after petition for a rehearing and therefore was not open for consideration. This Court held that the State Supreme Court had necessarily considered and disposed of the Federal question, and said:

> "But, further, it was said that granting there was a Federal question, as it was not asserted or relied upon until application for a rehearing, it is not open for consideration. The answer, however, is that the Court considered and disposed of the question by holding that the facts which were otherwise pertinent and controlling must be put out of view in the hands of Harold, the purchaser, was in fact negotiable paper, giving greater rights to such purchaser than could be enjoyed by the shipper, or by the one from whom he had acquired the bill. It is obvious, therefore, that this was a decision of a Federal question which we have power to dispose of as such, and we come to consider it.
>
> That the local rule applied by the court below was in direct conflict with the general commercial law on the subject, as repeatedly settled by this Court, is plain. Shaw v. North Pennsylvania R. Co. (Shaw v. Merchants' Nat. Bank), 101 U. S. 557, 25 L. Ed. 892; Pollard v. Vinton, 105 U. S. 7, 26 L. Ed. 998; St. Louis, I. M. & S. R. Co. v. Knight, 122 U. S. 79, 30 L. Ed. 1077, 7 Sup. Ct. Rep. 1132; Friedlander v. Texas & P. R. Co., 130 U. S. 416, 32 L. Ed. 991, 9 Sup. Ct. Rep. 570; Missouri P. R. Co. v. McFadden, 154 U. S. 155, 38 L. Ed. 944, 14 Sup. Ct. Rep. 990; The Carlos F.

Roses, 177 U. S. 655, 665, 44 L. Ed. 929, 933, 20 Sup. Ct. Rep. 803."

We desire to call the attention of the Court to the case of Yazoo & M. V. R. Co. v. Adams, 180 U S. 1, 45 L. Ed. 395. This case originated in an action at law begun in the Circuit Court for the first district of Mississippi, by the defendant in error, as revenue agent, suing for the use of the state and of the counties through which the defendant railways pass, to recover taxes assessed by the railroad commission of that state. Two other cases were also brought and these three cases were consolidated and a trial before a jury resulted in a verdict in part in favor of the plaintiff and in favor of defendants in part. Both parties appealed to the Supreme Court; but neither assigned a ruling upon a Federal question as error. The Supreme Court reversed the judgment and remanded the cause for a new trial. On going back to the lower court, the defendant filed special pleas to the declaration setting forth the exemption claimed under the charters of their constituent companies, and alleging that such exemption constituted a contract which had been impaired by the action of the state. The court struck out portions of these pleas and the other portions were withdrawn by the parties. A judgment was entered against the defendants for the amount sued for. The case was again appealed to the Supreme Court and a new opinion rendered

affirming the judgment of the court below. The case was then brought to the Federal Supreme Court. Motion was made to dismiss the case in the Federal Supreme Court upon the grounds: First, that the Federal question was not raised until after the decision of the Supreme Court. Second, that the action of the defendants in withdrawing their pleas and permitting a judgment to go against them, because the Circuit Court had struck from the files their additional pleas attempting to set up a Federal question, was an admission that they had no defense upon the facts of the case and deprived them of any right to insist upon a Federal question. Fourth, that the decision of the State Supreme Court on the first appeal raised no Federal question. The Court said:

> "Was the Federal question raised too late? The special pleas setting up distinctly the Federal question were filed after the case had been decided by the Supreme Court, its mandate had gone down to the Circuit Court, and the case was ready for a new trial. As already stated, certain of these pleas were stricken out upon motion of the plaintiff as constituting no defense to the action, and all the pleas, except such as had been stricken out by the Court, were then withdrawn, and a judgment *nil dicit* entered. On the case being again carried to the Supreme Court, that Court held that the action of the court below 'in striking out the special pleas stricken out was correct, for the obvious reason that they

presented no defense to the action, in whole or in part. The former opinion of the Court in this case settled definitely and conclusively all the issues involved, and the special pleas are in effect nothing else than an effort to have the Circuit Court disregard that opinion. The futility of that sort of pleading needs no sort of comment. These and all the other matters of practice and procedure assigned for error were correctly settled by the Court. The former opinion of this Court in this cause, and its opinion on the motion to strike that opinion from the files, disposed effectively of such of these matters as are not here specifically adverted to' (77 Miss. 315, 28 So. 956).

It is very evident that the Circuit Court, in striking out these pleas, took the view that the Supreme Court had, upon the first hearing, settled the law to be that no valid contract of exemption existed, and that if such contract existed in favor of the Louisville, New Orleans & Texas Railway Company (hereinafter styled the Louisville Company) it had been lost by the consolidation of October 24, 1892, and that the only effect of the special pleas was to inject a claim under the Federal Constitution as an argument for reversing its ruling. These pleas evidently raised precisely the same question that had been settled in a slightly different form. The Circuit Court treated this as an attempt to induce it to overrule the action of the Supreme Court, which, of course, was impossible. The Supreme Court not only held that the Circuit Court was correct in this view, but that the issues having

already been settled, it would itself treat them as *res judicata.*

* * * * * * *

It is true that in the suit under consideration the case was not formally sent back for an accounting, but it was practically so, since all the questions of law had been settled upon the first appeal, beyond the power of the Circuit Court to reopen, and upon the remand that court could do nothing else than enter judgment for the taxes of 1892, 1893 and 1894, as well as for the taxes of 1895. The Supreme Court, in deciding that it would not reopen the question involved upon the first hearing, to let in the Federal defense presented by the new pleas, merely settled a question of practice which we can not review.

By another process of reasoning we are led to the same conclusion. No leave was applied for or granted to file these additional pleas after the issues had been made up, as seems to be required by the practice in Mississippi, where it is said that all such pleas must be presented, with the application to file them, to the court, that it may judge of the propriety of the proposed action (Hunt v. Walker, 40 Miss. 590; Pool v. Hill, 44 Miss. 306; Pfeifer v. Chamberlain, 52 Miss. 90); and even if leave had been asked to file them, it was a matter of discretion with the trial court to permit it, and a matter of state practice which can not be inquired into here (Stevens v. Nichols, 157 U. S. 370, sub. nom. Carr v. Nichols, 39 L. Ed. 736, 15 Sup. Ct. Rep. 640; Mexican C. R. Co. v. Pinkney, 149 U. S. 199, 37 L. Ed. 701, 13 Sup. Ct. Rep. 859; Long Island Water Supply

Co. v. Brooklyn, 166 U. S. 688, 41 L. Ed. 1166, 17 Sup. Ct. Rep. 718). We are therefore of opinion that the Federal question was 'specially set up and claimed' too late to be of any avail to the plaintiffs in error.

2. But the very arguments urged upon us by the defendant in error for holding that the Federal question was set up too late, as well as the reasons given for affirming the decree of the court in striking out the additional pleas, furnish a strong argument in favor of the position assumed by the railroad companies, that the Federal question was necessarily involved and must have been passed upon at the first hearing. This argument is in substance that the pleas were properly stricken out, because they presented no defense as the case then stood, by reason of the decision of the Supreme Court on the first appeal (77 Miss. 184, 237, 24 So. 200).

In order to ascertain exactly what was in issue and what was decided by the Supreme Court, it is necessary to set forth the facts at some length.

* * * * * * *

"But upon the hearing of the case under consideration the Court (now differently constituted) overruled both of these cases and held, first, that the Legislature could not grant an exemption to a railway company under the Constitution of 1869; second, that it could not grant an irrepealable exemption under that Constitution; third, that a new company was formed by the consolidation of October 24, 1892, and no exemption passed into it; fourth, that if the con-

solidation were a technical merger, still, section 180 of the Constitution of 1890 prevented any exemption from passing into it; fifth, that any such exemption was repealed by the acts of 1884, 1886 and 1890. Manifestly, that Court could not have held the railways liable for the taxes in suit without deciding either that the provision of section 21 did not constitute a legal contract in view of the Constitution of 1869, or that no such contract existed in favor of the plaintiffs in error in view of the consolidation, or that the subsequent tax legislation of the State of 1892 and 1894 did not impair the obligation of that contract. All these were Federal questions, the vital one being whether the acts of 1892 and 1894 impaired the obligation of the contract, if any existed.

"In short, the case is one of those frequently arising under the second clause of Revised Statutes, section 709, in which the validity of a State statute under the Constitution of the United States is necessarily drawn in question, and, the decision of the State court being in favor of its validity, this Court will take jurisdiction, though the Federal question be not specially set up or claimed. As we have repeatedly had occasion to hold, it is only in cases arising under the third clause of the section, where a right, title, privilege or immunity is claimed, that the Federal question must be specially set up. The cases are collected in Columbia Water Power Co. v. Electric Street Railway, Light & Power Company, 172 U. S. 475, 488, 43 L. Ed. 521, 525, 19 Sup. Ct. Rep. 247. Thus, in Willson v. Black Bird Creek

March Co., 2 Pet. 245, 7 L. Ed. 412, the record did not show that the constitutionality of an act of a State Legislature was drawn in question; 'but', said the Chief Justice, 'we think it impossible to doubt that the constitutionality of the act was the question which could have been discussed in the State court'. So, in Satterlee v. Matthewson, 2 Pet. 380, 7 L. Ed. 458, it was said that, if it sufficiently appear from the record itself that the repugnancy of the statute of a State to the Constitution of the United States was drawn in question, this Court has jurisdiction, though the record does not in terms declare that the question was raised. See, also, Crowell v. Randell, 10 Pet. 368, 9 L. Ed. 458; Furman v. Nichols, 8 Wall. 44, 19 L. Ed. 370; Chicago L. Ins. Co. v. Needles, 113 U. S. 574, 28 L. Ed. 1084, 5 Sup. Ct. Rep. 681; Eureka Lake & Y. Canal Co. v. Yuba County Super. Ct., 116 U. S. 410, 29 L. Ed. 671, 6 Sup. Ct. Rep. 429; Kaukauna Water Power Co. v. Green Bay & M. Canal Co., 142 U. S. 254, 35 L. Ed. 1004, 12 Sup. Ct. Rep. 173. And the fact that the Supreme Court of the State did not expressly refer to the contract clause of the Constitution does not prevent our taking jurisdiction, if the applicability of such clause were necessarily involved in its decision. As was said by Chief Justice Waite in Chapman v. Goodnow, 123 U. S. 540, 548, 31 L. Ed. 235, 238, 8 Sup. Ct. Rep. 211, 215: 'If a Federal question is fairly presented by the record, and its decision is actually necessary to the determination of the case, a judgment which rejects the claim, but avoids all reference to it, is

as much against the right, within the meaning of section 709 of the Revised Statutes, as if it had been specifically referred to and the right directly refused'."

This is not a case wherein the Federal question must be asserted and raised, or waived by a failure to do so; but, the Federal statutes and the principles of law announced by the Federal courts control and fix the rights of the parties and apply to the facts of the case. These statutes and principles of law cannot be changed, modified or set aside by acts of the parties; nor does a failure to assert their rights under these laws waive the application of the laws, nor shift the burdens fixed by these laws. This case falls within the rule stated in *Louisville & N. R. Co. v. Ohio Valley Tie Co.*, 242 U. S. 288, 61 L. Ed. 305, in which it is held:

"A case in which the defeated party insisted at the trial court and on appeal in the highest State court upon its asserted rights under the Interstate Commerce Act of February 4, 1887 (24 Stat. at L. 382, Chap. 104, Comp. Stat. 1913, section 8572), and in which those rights were passed upon adversely by the latter Court, is within the appellate jurisdiction of the Federal Supreme Court."

How could the defendant carrier, by any form of pleading, or the Supreme Court of Kansas by uphold-

ing certain of its contentions and refusing to uphold its contention as to the invalidity of the bills of lading under the Interstate Commerce Act, suspend the operations of that act, or substitute the Kansas decisions for those of this Court as the governing law and which applies and must apply to all interstate transactions?

For the reasons given, plaintiff in error asks that the judgment of the Supreme Court of Kansas be reversed.

Respectfully submitted,

JOSEPH M. BRYSON,

W. W. BROWN,

JAMES W. REID,

Attorneys for Plaintiff in Error.

SUBJECT-INDEX OF CONTENTS.

CASES CITED.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1918.

No. 90.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY,

Plaintiff in Error,

v.

JOHN SEALY, SEALY HUTCHINGS, GEORGE SEALY, Jr., and H. O. STEIN, Partners, as Hutchings, Sealy & Co.,

Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

Brief and Argument for Defendants in Error

STATEMENT OF THE CASE.

This action was begun in the District Court of Labette County, Kansas, on March 29, 1905 (Tr., p. 3). It was based on the failure of plaintiff in error, defendant below, to deliver to the defendants in error, plaintiffs below, at Galveston, Texas, twenty-seven carloads of wheat under

twenty-seven bills of lading issued at Kansas City, Mo., in the month of June, 1900, by the railway company to one J. K. Davidson, doing business as J. K. Davidson & Co. Said bills of lading each purported to represent one car of bulk wheat consigned, "shipper's order, notify J. K. Davidson & Co., Galveston, Texas", and duly assigned (Tr., pp. 11, 12) and sent through a bank with draft attached to defendants in error at Galveston, who advanced money on the faith of such bills of lading (Tr., pp. 4, 5). The record shows that these bills of lading were issued from the office and bore the signature of F. A. Leland, then assistant general freight agent and the highest official of the railway company at Kansas City (Tr., pp. 43, 61), and authorized to issue bills of lading, and to issue them upon the presentation of elevator receipts or certificates, as was done in this instance (Tr., pp. 43, 63, 64). As to the authority of such agent the Supreme Court of Kansas, in its opinion (98 Kan., 225; Tr., p. 86) found that "the proof was ample that the bills of lading were issued by the authority of an officer for whose conduct the defendant must answer" (Tr., p. 86).

It later transpired that the grain described in these twenty-seven bills of lading was never received by the railway company, by reason of which it refused to perform its contract to carry and deliver the same to the holders of said bills of lading (Tr., p. 25).

After several years of negotiation for a settlement with Davidson, a balance still remained due on the sum advanced by defendants in error on said bills of lading, for which balance this action was instituted (Tr., pp. 3-15).

The judicial history of the case has been extended far beyond the usual limits.

To plaintiffs' petition defendant filed a general demurrer, which was overruled, and an exception saved. An answer was then filed, setting up several defenses, alleging in substance as follows (Tr., 15-23): (1) A general denial; (2) that one F. M. Harris is the real party in interest; (3) another action pending; (4) a two years' statute of limitations in bar; (5) a three years' statute of limitations in bar; (6) a denial that said bills of lading were issued by its authority; (7) a former suit and compromise of the claim; (8) the consummation of the compromise mentioned in the seventh defense; (9) said bills of lading were issued by some clerk without authority, and in violation of the laws of Missouri; said bills of lading being issued within the State of Missouri and being a Missouri transaction, and the rights and duties of the parties being governed by the laws of that state, citing and setting out sections 5048-5057, Rev. Stats. of Missouri, 1899, and citing a decision of the Supreme Court and another decision of the Court of Appeals of Missouri; (10) section 4274, Rev. Stats. of Missouri, 1899, a three years' statute of limitations, in connection with section 4450, Gen. Stats. of Kansas, 1901; and (11) failure to give notice of claim.

Plaintiffs filed a demurrer to the ninth and tenth defenses of the answer which the district court sustained. The railway company excepted and appealed from the rulings of the court upon both demurrers—that of defendant to the petition and of plaintiffs to the answer. Both demurrers were held by the State Supreme Court to be not well taken (78 Kan., 758, 761, 769, 773; Tr., pp. 84-85).

The main contention raised by the defendant's demurrer, as stated by the Supreme Court (78 Kan., 764), was that the defendant cannot be held liable because only the receipt of the goods confers power on the agent to

issue the bills. Two antagonistic doctrines were said to prevail on this question. The one contended for by the defendant was stated to be held by the English courts, by the Federal courts and by the courts of several states. The contrary doctrine was thus stated by the Supreme Court of Kansas (78 Kan., 765):

> "The carrier is held liable upon the theory that the knowledge whether the goods have been received, and therefore the power in fact conferred, lies peculiarly with the agent of the carrier; that one of the purposes for which the agent is employed is to state in the bill of lading the fact of the receipt of the goods therein described; and, where the railway company or other carrier holds an agent out to the public as having authority to make a statement upon which innocent parties may rely, the company should not be permitted to deny the receipt of the goods as stated in the bill. The action of the carrier in thus holding its agents out to the public as having authority to issue such bills, and putting it in the power of a holder to treat with innocent purchasers on the representations of the bills, is held to constitute an estoppel *in pais*. The doctrine rests also for its support largely upon the quasi-negotiability of bills of lading and the commercial necessities for the rule growing out of the usual method of transacting business of this character, and the mutual advantages which the shipper, carrier and the public derive therefrom."

This latter doctrine, as announced in *Savings Bank* v. *Railroad Co.*, 20 Kan., 519, the court applied to this case, and held the bills of lading valid obligations of the railway company in the hands of the plaintiffs. The bills of lading were thus declared valid under the common law of Kansas, and the petition not subject to the demurrer.

As to plaintiffs' demurrer to the ninth and tenth paragraphs of the defendant's answer alleging that the bills of

lading were Missouri transactions, to be governed solely by the laws of that state which were pleaded, the court held the allegations of the answer sufficient.

Defendant's answer having been held good as against plaintiffs' demurrer, as just stated, a reply was thereupon field (Tr., pp. 24-27, 85), which consisted of (1) a general denial; (2) a special denial of the force and effect of the laws of Missouri as pleaded in the ninth paragraph of the answer; and (3) setting up facts showing knowledge on the part of the railway company of the plaintiffs' claim and facts showing waiver of formal notice, absence of which was pleaded in the eleventh paragraph of the answer. Attached to said reply as Exhibits A, B and C (Tr., pp. 27-41) were the Missouri decisions relied on by plaintiffs to sustain its position that the bills of lading are valid in the hands of an innocent purchaser, though issued without the receipt of the grain, and also the two decisions relied on by defendant in paragraph nine of its answer.

To the reply defendant filed a general demurrer (Tr., p. 41), which was sustained by the district court, from which ruling plaintiffs appealed to the State Supreme Court, where the judgment was reversed with directions to overrule the demurrer (Tr., pp. 42, 85; 84 Kan., 479). It was held that the Missouri statutes pleaded by defendant as governing the transaction (Tr., pp. 18-21) make bills of lading negotiable in the stricter meaning of the term, that is, it gives them the quality of investing an innocent purchaser with greater rights than those possessed by the original holder, and that a railway company is bound thereunder, although no goods were in fact received by it.

Neither the opinion in 78 Kan. 758, nor in 84 Kan. 479, contains any hint that a Federal question is involved

in the case. The language of the opinion in the former case strongly negatives the idea that any such claim was made by the railway company. Thus, the court says (78 Kan. 767, 768, italics ours):

> "It is insisted by the defendant that while the case of *Savings Bank* v. *Railroad Co., supra,* may rest upon the better reasoning, *still in view of the fact that one of the greatest commercial nations of the world has approved the contrary doctrine, and especially because our federal courts have established a different rule, which is followed in so many of the states, therefore in the interests of uniformity the doctrine declared in that case should be changed.*"

Moreover, the ninth paragraph of defendant's answer expressly excluded the application to the case of any Federal law by the following averment (Tr., p. 18):

> "Said receipts or bills of lading, alleged in the amended petition herein, were made without this state and within the State of Missouri, and was a Missouri transaction, and the rights and duties of the parties are governed by the laws of the State of Missouri."

It was upon this answer, and upon a supplemental answer (Tr., p. 42), which made no change in the original answer in the allegation as to the controlling force of the laws of Missouri, that the case went to trial.

Thus from the institution of the action in March, 1905, until the trial, which began on July 12, 1913 (Tr., p. 42), a period of over five years, there is no suggestion in the record of a Federal question. And not only was there no suggestion of such a question, but a total exclusion thereof by the allegation in the answer that the case was governed by the laws of Missouri.

At the trial the railway company made the following objection (Tr., p. 43):

> "Defendant objected to the introduction of said bills of lading, on the ground that the evidence was irrelevant, incompetent and immaterial, and that the bills of lading were void under the laws of Missouri and the Interstate Commerce laws. The objection was overruled, to which ruling the defendant excepted."

In the motion for a new trial (Tr., p. 59) there is no charge that the court denied to defendant any Federal right, nor that it erred in the admission of any evidence.

On defendant's appeal to the Supreme Court of Kansas from the judgment in favor of plaintiffs, the "Specifications of Error" contained no mention of a Federal question. But in its brief in that court, the question was argued on four of its forty-six pages, the defendant apparently at that time not relying on the question.

The only authority cited to the point that the judgment was in violation of the interstate commerce laws was the case of *Railway Co.* v. *Harriman*, 227 U. S. 657, a case which arose in 1907, and was governed by the Carmack Amendment. While the case at bar arose before that amendment and is not governed by it.

After the decision and judgment of the Supreme Court (98 Kan. 225), to reverse which this writ of error was sued out, the Federal question was pressed upon the attention of the court in the petition for rehearing (Tr., pp. 87-91). Neither in the argument at the submission of the case on appeal nor in the petition for rehearing was there any specific claim of any Federal right which had been denied, nor any attempt to point out any specific Federal

statute which had been violated. The petition for rehearing was denied without comment or opinion (Tr., p. 91).

In its opinion (98 Kan. 225; Tr., pp. 84-86) the Supreme Court, after stating that the case was before it on a third appeal, and that the nature of the controversy was sufficiently indicated in the former opinions (78 Kan. 758, 84 Kan. 479), proceeded to give its reasons for declining to consider the railway company's contention, to-wit, that the bills of lading were void under Federal statutes claimed to govern the rights of the parties. The following excerpts from the opinion are pertinent (Tr., pp. 84-86):

> "The defendant filed a general demurrer to the plaintiff's petition which was overruled. On the first appeal, which was taken by the defendant, it was argued that the demurrer should have been sustained. No suggestion was made to the court that the case was governed by federal law, and this court adjudged that the demurrer was properly overruled. In its answer the defendant expressly pleaded that the bills of lading were made in the State of Missouri, were Missouri transactions, and were governed by the law of Missouri. The statutes of the State of Missouri were set out, decisions of the Missouri courts construing the statutes were cited, and it was expressly alleged that the law of Missouri governed the rights and duties of the parties to the action. On the first appeal this answer was held to be good against the plaintiff's demurrer. The plaintiff replied, setting out the decisions of the courts of Missouri bearing on the subject. The defendant demurred to the reply. On the second appeal it was determined that the question raised was presented in such form that it became one of law for the court and not one of fact for a jury, and the law of the state of Missouri was declared. On these pleadings the case went to trial."
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> • • •

"The plaintiff offered the bills of lading in evidence. The defendant objected on the ground the bills of lading were void under the laws of the state of Missouri and under the *interstate commerce laws.* The objection was overruled, and the record is barren of any other suggestion that the *interstate commerce laws applied.* On its side of the case the defendant offered in evidence the statutes of the state of Missouri which it had pleaded.

"*Having appealed from the judgment of the district court overruling the demurrer to the petition, and having kept silent then with respect to the application of the federal law, the action of this court is an adjudication of the law of the case, binding on the defendant. The defendant cannot be allowed to settle the law of the case piecemeal any more than it can be allowed to settle the facts in that way.* (*Estes* v. *Zinc Co.,* 97 Kan. 774, 156 Pac. 758.) Besides this, the defendant chose to defend the action on the express ground, pleaded *in extenso,* that the bills of lading were governed by the law of the state of Missouri and that the rights and duties of the parties in respect to the matters complained of in the petition were defined by the Missouri law. The defendant presented this subject to this court on the first appeal. [Italics ours.]

* * *

"This adjudication was binding on the defendant and on the trial court, and the defendant could not at the subsequent trial, without asking permission to change the issue and while still asserting that the Missouri law governed, shift its defense to some other law. Having been defeated on the theory of the litigation which it proposed and which it induced this court to accept, the defendant is in no position to ask this court to adopt a new theory according to which the propriety of the judgment shall be tested. It is estopped by its pleading and by the adjudications of this court in its favor based on that pleading.

* * *

"The law of Missouri was determined on the second appeal, and that adjudication became the law of the case.

* * *

"The proof was ample that the bills of lading were issued by the authority of an officer for whose conduct the defendant must answer."

In substance, the court held the defendant was estopped to raise a Federal question because it had expressly pleaded that the bills of lading were a Missouri transaction to be governed by the laws of that state, and having appealed from the ruling of the district court overruling the plaintiffs' demurrer to that portion of its answer and procured from the Supreme Court a decision sustaining its answer, it was thereafter too late to change front and adopt a new theory of the case.

It is to be noted from the opinion of the court that there was no *denial* of the Federal right attempted to be raised. The court merely *declined to consider* that question.

BRIEF OF ARGUMENT.

I.

THE FEDERAL QUESTION, IF ANY, WAS NOT "ESPECIALLY SET UP OR CLAIMED" AT THE PROPER TIME OR IN THE PROPER WAY.

It appears from the fourth assignment of error (Tr., p. 94; brief, p. 10) that plaintiff in error, in claiming the existence of a Federal question in this case, relies on the third clause of Section 709, Rev. Stats., Section 237 of the Judicial Code (as it was before the amendment of Sept. 6, 1916), providing for a writ of error to the state court where any *title, right, privilege or immunity is "especially set up or claimed"* under any statute of the United States. *Where the claim is made under this clause, the Federal right must be specially set up.* Under the first and second clauses only is it sufficient if the question is necessarily involved in the disposition of the case.

> *Yazoo, etc., Ry. Co.* v. *Adams,* 180 U. S. 1, 14;
> *Michigan Sugar Co.* v. *Michigan,* 185 U. S. 112, 113;
> *Oxley Stave Co.* v. *Butler Co.,* 166 U. S. 648, 654;
> *Chicago, etc., R. Co.* v. *Chicago,* 164 U. S. 454, 457;
> *Onandago Nation* v. *Thacher,* 189 U. S. 306, 311;
> *Morrison* v. *Watson,* 154 U. S. 111, 115.

The fact that under the third clause of Section 709, Rev. Stats. the Federal right must be "especially set up" is emphasized in *Yazoo & M. V. R. Co.* v. *Adams,* 180 U. S. 1, 14, from which plaintiff in error has quoted exten-

sively (brief, pp. 59-66) In that case the Federal question arose under the second clause of section 709, Rev. Stats., and in that respect it differs from the case at bar, where the Federal question, if any, arises under the third clause of that section (Tr., p. 94).

In *Oxley Stave Co.* v. *Butler Co., supra,* Mr. Justice Harlan, delivering the opinion of the court, said (pp. 654-655):

> "The words 'specially set up or claimed' in section 709 of the Revised Statutes * * * were in the twenty-fifth section of the Judiciary Act of 1789 (1 Stat., 85), and were inserted in order that the revisory power of this court should not extend to rights denied by the final judgment of the highest court of a State, unless the party claiming such rights plainly and distinctly indicated, before the state court disposed of the case, that they were claimed under the Constitution, treaties or statutes of the United States. The words 'specially set up or claimed' imply that if a party intends to invoke for the protection of his rights the Constitution of the United States or some treaty, statute, commission or authority of the United States, he must so declare; and unless he does so declare 'specially' that is, unmistakably, this court is without authority to re-examine the final judgment of the state court."

This case had been carried to the Supreme Court of Kansas twice, the first time by defendant and the second time by plaintiffs, and the law of the case had been settled before the trial. In its answer, defendant specially pleaded that the issuance of the bills of lading was a Missouri transaction to be governed by the laws of that state, setting them out (Tr., pp. 18-21), thereby positively and affirmatively excluding the application of any other law, including

the Interstate Commerce laws. There was thus not only a failure to *set up any right under a Federal statute, but an express and emphatic negation of any such right being involved in the case.* This is very different from mere inaction and non-claim of the supposed Federal right. With the answer in this condition, defendant carried the case to the Supreme Court where it was held such answer was good against demurrer. On the second appeal, *the answer remaining the same,* the law of Missouri, as pleaded, was declared. Thereafter, the case came to trial on the *same answer,* when "defendant objected to the introduction of said bills of lading on the ground that the evidence was irrelevant, incompetent and immaterial and that the bills of lading were void "*under the laws of the State of Missouri* and the Interstate Commerce Laws (Tr., p. 43). This objection was properly overruled, as the defendant had raised no such issue in its answer, and as, under the decisions of the Supreme Court of Kansas in the case, the bills of lading were valid in the hands of an innocent purchaser. Moreover, the form of the objection is absolutely contradictory of a claim that the case was controlled by the Interstate Commerce Laws, because it at the same time declared, that it was controlled by the laws of Missouri. The Federal right, if any, must be exclusive, not concurrent. We submit that by such objection no Federal right was "*especially set up or claimed.*"

We find no other indication in the record of any claim of a Federal right except in the opinion of the Supreme Court of Kansas on the last appeal (Tr., pp. 84-86) and in the petition for rehearing (Tr., 87-91). In the opinion, the court refused to consider the question, not only because not raised in time, but because by affirmative action in pleading and in the appeals defendant excluded the idea

of such question being in the case and had estopped itself to raise the question. The court overruled the petition for rehearing without comment or opinion (Tr., p. 91). There was thus *no decision* by the Supreme Court of Kansas *against the Federal right* so claimed by defendant. The court *merely declined to consider the question.* Where such is the case, no Federal question is presented for review in this court.

Missouri P. Ry. Co. v. *Taber,* 244 U. S. 200, 202;
Atlantic, etc., Ry. Co. v. *Mims,* 242 U. S. 532, 536;
Louisville & N. R. Co. v. *Woodford,* 234 U. S. 291, 309.

It has been held in many decisions of this court that the claim that there has been a denial of a Federal right will not be considered unless made in accordance with state practice, among others, the following:

Missouri P. Ry. Co. v. *Taber,* 244 U. S. 200, 202;
Atlantic, etc., Ry. Co. v. *Mims,* 242 U. S. 532, 535, 536;
St. Louis, etc., Ry. Co. v. *Shepherd,* 240 U. S. 240, 241;
Louisville & N. R. Co. v. *Woodford,* 234 U. S. 46, 51;
Mutual Life Ins. Co. v. *McGrew,* 188 U. S. 291, 309;
Morrison v. *Watson,* 154 U. S. 111, 115;
Baldwin v. *State of Kansas,* 129 U. S. 52, 57;
Spies v. *State of Illinois,* 123 U. S. 131, 181.

In *Railway Co.* v. *Taber, supra,* an action was brought under the state statute for the death of a switchman

employed by plaintiff in error. This court was asked to reverse the judgment because the Federal Employers' Liability Act was not applied, but the rights and liabilities of the parties were determined by state laws. The writ of error was dismissed, the court noting that the *answer did not set up the Federal Statute, and that the State Supreme Court declined to consider the question because not raised according to the state practice.* Mr. Justice McReynolds, delivering the opinion of the court, said (244 U. S. 201, 202):

> "Unless some right, privilege, or immunity under the federal act was duly and especially claimed we have no jurisdiction. Judicial Code, Sec. 237. Speaking for the court in *Erie R. R. Co.* v. *Purdy*, 185 U. S. 148, 154, Mr. Justice Harlan announced the applicable rule. 'Now, where a party—drawing in question in this court a state enactment as invalid under the Constitution of the United States, or asserting that the final judgment of the highest court of a State denied to him a right or immunity under the Constitution of the United States—*did not raise such question or especially set up or claim such right or immunity in the trial court, this court cannot review such final* judgment and hold that the state enactment was unconstitutional or that the right or immunity so claimed had been *denied* by the highest court of the State, if that court did nothing more than decline to pass upon the Federal question because not raised in the trial court as required by the state practice.'" (Italics ours.)

In *St. Louis, etc., Ry. Co.* v. *Shepherd, supra,* the court said (240 U. S. 241):

> "The claim under the Carmack Amendment was first set up and asserted in a petition for rehearing after the judgment in the trial court was affirmed

by the Supreme Court of the State. The petition was not entertained, but was denied *without passing upon the Federal question thus tardily raised. That question therefore is not open to consideration here.*" (Italics ours.)

It was held in *Railroad Company* v. *Woodford, supra* (234 U. S. 51):

> "The decisions of this Court not only have repeatedly held that a Federal right in order to be reviewable here must be *set up and denied in the state court, but have often held that such claim of denial is not properly brought to the attention of this Court where it appears that the state court declined to pass upon the question because it was not raised in the trial court as required by the state practice.*" (Italics ours.)

To the same effect are the other cases cited above as well as many cases which have been examined, but not cited.

As to what is the practice of the Supreme Court of Kansas in respect to the consideration of questions not properly before it under the state practice, we have first of all the decision in the case at bar, where in its opinion (Tr., pp. 84-86) it holds that a Federal question was not raised at the proper time nor in the proper way. That in such case *this court will feel bound by the decision of the state court in the same case* was held in *Atlantic, etc., Ry. Co.* v. *Mims,* 242 U. S. 532, where the court, speaking by Mr. Justice Clarke, said (p. 535):

> "To become the basis of a proceeding in error from this court to the Supreme Court of a state, 'a right, privilege or immunity' claimed under a statute of the United States must be 'especially set up or

claimed,' and must be denied by the state court. Rev. Stats. Sec. 709; Judicial Code, Sec. 237. This means that the claim must be asserted at the proper time and in the proper manner by pleading, motion or other appropriate action under the state system of pleading and practice. *Mutual Life Insurance Co.* v. *McGrew,* 188 U. S. 291, 308, *and upon the question whether or not such a claim has been so asserted the decision of the state court is binding upon this court, when it is clear, as it is in this case, that such decision is not rendered in a spirit of evasion for the purpose of defeating the claim of federal right.''* (Italics ours.)

It has also been determined by the Kansas Supreme Court that a question not raised in the trial court will not be considered on appeal, *Board of Education, etc.* v. *Jacobus,* 83 Kan. 778; that a defense not made by the pleadings will not be considered by the Supreme Court, *Chamberlain* v. *Monkhouse,* 67 Kan. 836, 837; *that the Supreme Court will decline to consider a question presented in a brief* (as was done at the last appeal in the case at bar), *which was not presented to the trial court, St. Louis, etc., R. Co.* v. *Beets,* 75 Kan. 295; that only such questions as have been raised and decided in the trial court will be reviewed by the Supreme Court, *Byington* v. *Board of Commissioners,* 37 Kan. 654; that, as a general rule the Supreme Court will notice no question not distinctly raised in the trial court and presented first to such court for its decision, *Kansas P. Ry. Co.* v. *Mihlman,* 17 Kan. 224 (opinion by Judge Brewer, later a member of this Court).

It has also been held by the Kansas Supreme Court with respect to the effect of a former appeal in the same case, that it becomes the law of the case not merely as to all questions actually presented by counsel, but as to all questions then existing in the record and necessarily

involved in the decision. *A. J. Harwi Hardware Co.* v. *Klippert,* 73 Kan. 783; *Headley* v. *Challiss,* 15 Kan. 602; *Modern Woodmen of America* v. *Gerdom,* 77 Kan. 401; *Griffin* v. *Fredonia Brick Co.,* 90 Kan. 375.

It was not until the third appeal to the State Supreme Court that plaintiff in error attempted to raise a Federal question. That such question is raised too late on a second appeal has been held by this Court.

> *Bonner* v. *Gorman,* 213 U. S. 86, 91;
> *Yazoo, etc., Ry. Co.* v. *Adams,* 180 U. S. 1, 8;
> *Union Mutual Life Ins. Co.* v. *Kirchoff,* 169 U. S. 103, 110.

Under paragraph III of its brief (pp. 39-47), plaintiff in error argues that the case could not have been brought here until after the last appeal. We are at a loss to see how this argument helps the plaintiff in error. The question it has to meet here is whether or not it raised a Federal question at the proper time and in the proper way. It is incumbent upon it to explain why, with an answer setting up the Missouri statutes as controlling the case and containing no hint of a reliance on any Federal Statute, it made no attempt after two appeals to the Supreme Court, to amend its answer before the case finally came to trial, eight years after the action was begun. But even assuming that the case could have been brought here on either of the first two decisions of the state court, it would not have presented any Federal question for the consideration of this court, because not even the semblance of a Federal question had then been raised, which fact of itself would have prevented plaintiff in error from bringing the case here on either of the former decisions of the state court.

The Supreme Court of Kansas rightly held in its opinion (Tr., pp. 84-86) that the defendant railway company had estopped itself to claim any Federal question was in the case.

The argument of the plaintiff in error under paragraph IV of its brief (pp. 47-67) is of the same general tenor as that under paragraph III.

It is contended that the pleading of the Missouri statutes in the answer was mere surplusage and should be rejected as such. If this can be said of an averment (Tr., p. 18) upon which plaintiff in reality made its sole defense and to sustain which it appealed to and secured a decision of the state Supreme Court in its favor, and proceeded to trial on the same answer and never at any time asked leave to amend, then pleadings are mere scraps of paper.

But even if this part of the answer were rejected, that still leaves the answer without any claim of a Federal right. It is argued, however, that the Federal question permeated the case and presented itself at every turn, so that the defendant railway company was relieved of all responsibility to inform the court of its claim. In other words, though from its fourth assignment of error it claims a Federal right under the *third* clause of section 709 (section 237 of the Judicial Code before the amendment of September 6, 1916), it contends it was not required to "especially set up" such right. This Court has held differently in several cases cited, *supra*. Particularly pertinent is the case of *Railroad Co.* v. *Mims, supra,* where, as already seen, the Court said (242 U. S., 535-536):

> "The plaintiff in error mistakenly argues that under recent decisions of this court it is not necessary to claim the benefits of the Federal Employers' Liabil-

ity Act in a pleading in a state court in order to obtain a review here of a decision denying or refusing to consider such a claim."

In connection with the point under discussion, plaintiff in error has cited (brief pp. 57-59) the case of *Atchison etc., Ry. Co.* v. *Harold,* 241 U. S., 371. That case, which we have referred to at some length under paragraph III, differs materially from the case at bar on this question. In the Harold case there was mere non-action,—failure to claim any Federal right until the rehearing, while here there was not only non-claim of any such right, but an absolute and express claim in the answer (Tr., p. 18) that the case was governed by the statutes of Missouri, which were set out. That answer was never amended. In the Harold case no claim was made as in the case at bar, that the case was governed by any state statute, in direct contradiction of a Federal statute being involved. Nor did the railway company in the Harold case, as in this case, carry the case to the State Supreme Court for the express purpose of procuring a decision from that court as to the sufficiency of its answer, *in the very particular mentioned,* as against the plaintiffs' demurrer (*Ry. Co.* v. *Hutchings,* 78 Kan., 758). We submit that the Supreme Court of Kansas was right in holding, as it did (Tr., p. 86), that *defendant in this case could not thus "shift its defense to some other law",* and that by such conduct it was estopped to claim a Federal right.

The case of *Railway Co.* v. *Wulf,* 226 U. S., 570, is cited by plaintiff in error (brief, p. 51), in support of the contention that the defense might properly be shifted from the Missouri statute to the Federal statute. In the Wulf case the petition as originally drawn was based upon the Kansas

statute, but was afterwards amended to state a cause of action under the Federal Employers' Liability Act. Hence the Wulf case does not aid plaintiff in error for the reason that it has never shifted its defense which at all times remained the same—based on the Missouri statute. If the answer had been amended, as was the petition in the Wulf case, and the right to so amend was being contested, that case might be in point.

It is submitted for the reasons stated, the case is not properly here for consideration upon the merits, and that the writ of error should be dismissed for want of jurisdiction.

II.

THE JUDGMENT OF THE SUPREME COURT OF KANSAS IN THIS CASE IS NOT IN CONFLICT WITH THE INTERSTATE COMMERCE ACT OF FEBRUARY 4, 1887, AS AMENDED IN 1889; NEITHER DOES IT CONSTITUTE A BURDEN, DIRECT OR INDIRECT, UPON INTERSTATE COMMERCE.

We shall discuss the above proposition, the converse of which is claimed to be true by plaintiff in error (brief, p. 39), under two heads, (1) the case is not governed by the Interstate Commerce Act, and (2) the judgment of the Supreme Court of Kansas does not impose a direct burden upon interstate commerce.

1. The Judgment of the Supreme Court of Kansas is not in conflict with the Interstate Commerce Act of February 4, 1887, as amended in 1889.

The contention of plaintiff in error discussed in paragraphs I and II of its brief (pp. 16-39) is that the bills of lading involved in this case, being issued without the receipt of wheat described therein, are void and that their validity and the liability of the carrier thereon are questions of Federal law, governed by the Interstate Commerce Act and Federal decisions.

As we have already seen, the Supreme Court of Kansas, in testing the sufficiency of plaintiffs' petition on defendant's demurrer, applied the common law of that state as announced in *Savings Bank* v. *Railroad Co.*, 20 Kan., 519, and held the bills of lading valid obligations against the railway company in the hands of the plaintiffs as innocent purchasers thereof. *Railway Co.* v. *Hutchings* (1908), 78 Kan., 758. On the second appeal (*Hutchings* v. *Railway Co.* (1911), 84 Kan., 479) from the ruling of the district court on plaintiffs' demurrer to the answer, it was held that a like result followed from the statutes of Missouri, which defendant especially invoked in the ninth paragraph of its answer (Tr., pp. 18-21) as governing the transaction. The conclusion reached by the Supreme Court of Kansas on the two appeals, is not in harmony with the decisions of this Court in several cases cited in the brief of plaintiff in error. These cases, however, involved no question of the validity of the bills of lading under the Interstate Commerce Act, nor any Federal question whatever, as we understand. They arose in Federal courts and were decided in accordance with the general law as administered in those courts. The cases referred to are *Shaw* v. *Bank*, 101 U. S., 557; *Pollard* v. *Vinton*, 105 U. S., 7; *Railway Co.* v. *Knight*, 122 U. S., 79; *Friedlander* v. *Railroad Co.*, 130 U. S., 416; *Railway Co.* v. *McFadden*, 154 U. S., 155.

Defendants in error contend that the doctrine of these cases is not applicable to the case at bar, but that the Supreme Court of Kansas properly applied its own common law and the statute law of Missouri as construed by it. The reasons for such contention will be stated under paragraph III of this brief.

At this place we shall discuss the contention of the railway company that the bills of lading are void under the Interstate Commerce Act of February 4, 1887, as amended March 2, 1889 (24 St. L., 379, Ch. 104; 25 St. L., 855-857, Ch. 382), and as in force when the bills were issued in June, 1900. The parts of the act which are stated to effect this result are portions of sections 2, 3, 6 and 10. As the parts of the Act relied on and shown in the brief (pp. 16-20) do not purport to be an exact copy, we here set them out:

> "Sec. 2. That if any common carrier subject to the provisions of this act shall, directly or indirectly by special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful." (24 St. L. 379.)
>
> "Sec. 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever or to subject any particular person, company, firm, corporation, or locality, or any

particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding and delivering of passengers and property to and from their several lines, and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business." (3 St. L. 380.)

"Sec. 6. That every common carrier subject to the provisions of this act shall print and keep open to public inspection schedules showing the rates and fares and charges for the transportation of passengers and property which any such common carrier has established and which are in force at the time upon its route. The schedules printed as aforesaid by any such common carrier shall plainly state the places upon its railroad between which property and passengers will be carried and shall contain the classification of freight in force, and shall also state separately the terminal charges and any rules or regulations which in anywise change, affect or determine any part or the aggregate of such aforesaid rates and fares and charges. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be posted in two public and conspicuous places, in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation in such form that they shall be accessible to the public and can be conveniently inspected. (25 St. L. 855.)

* * *

And when any such common carrier shall have established and published its rates, fares, and charges in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, collect, or receive from any person or persons a

greater or less compensation for the transportation of passengers or property, or for any services in connection therewith, than is specified in such published schedule of rates, fares, and charges as may at the time be in force." (25 St. L. 856.)

"Sec. 10 * * * Any common carrier subject to the provisions of this act, or whenever such common carrier is a corporation, any officer or agent thereof, or any person acting for or employed by such corporation, who by means of false billing, false classification, false weighing, or false report of weight, or by any other device or means, shall knowingly and willfully assist, or shall willingly suffer or permit, any person or persons to obtain transportation for property at less than the regular rates then established and in force on the line of transportation of such common carrier, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding five thousand dollars, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense.

Any person and any officer or agent of any corporation or company who shall deliver property for transportation to any common carrier, subject to the provisions of this act, or for whom as consignor or consignee of any such carrier shall transport property, who shall knowingly and willfully, by false billing, false classification, false weighing, false representation of the contents of the package, or false report of weight, or by any other device or means whether with or without the consent or connivance of the carrier, its agent or agents, obtain transportation for such property at less than the regular rates then established and in force on the line of transportation, shall be deemed guilty of fraud, which is hereby declared to be a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject for each offense to a fine of not exceeding five thousand dollars or imprisonment in the penitentiary for a term of not ex-

ceeding two years, or both, in the discretion of the court.

If any such person, or any officer or agent of any such corporation or company, shall, by payment of money or other thing of value, solicitation, or otherwise, induce any common carrier subject to the provisions of this act, or any of its officers or agents, to discriminate unjustly in his, its, or their favor as against any other consignor or consignee in the transportation of property, or shall aid or abet any common carrier in any unjust discrimination, such person, or such officer or agent of such corporation or company, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding five thousand dollars, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense; and such person, corporation, or company shall also, together with said common carrier, be liable, jointly or severally, in an action on the case to be brought by any consignor or consignee discriminated against in any court of the United States of competent jurisdiction for all damages caused by or resulting therefrom." (25 St. L. 857.)

This is the first time in all these long drawn out proceedings that plaintiff in error has pointed out the sections of the Interstate Commerce Act which are claimed to invalidate the bills of lading, and to govern this case. It will be seen that no part of the act subsequent to the amendment of 1889 is claimed by plaintiff in error to be applicable to the case at bar.

We have read these provisions of the act and the decisions cited in support of the contention of the plaintiff in error, as well as the argument thereon, and fail to see what bearing they have upon the validity of the bills of lading.

Section 2, supra, remains as when first enacted in 1887. Its purpose is to prevent unjust discrimination and to enforce equality between shippers over the same line, in respect to rates and charges, and to prohibit any rebate or other device whereby shippers under substantially similar conditions and circumstances are compelled to pay different rates.

> *Texas & Pacific Ry. Co.* v. *Interstate Commerce Commission,* 162 U. S., 197, 213;
> *Wight* v. *United States,* 167 U. S., 512, 518;
> *Interstate Commerce Commission* v. *Alabama Midland Ry. Co.,* 168 U. S., 144, 166.

There is nothing in the record that shows any discrimination in rates, or any rebate or device which would result in one shipper paying more or less than another shipper under similar circumstances and conditions. If there was such discrimination it was for the railway company to produce evidence thereof at the trial.

Section 3, *supra,* has not been amended since its enactment in 1887.

The section declares it unlawful for any interstate common carrier to make or give any undue or unreasonable preference or advantage to any person, firm, corporation, locality or any particular description of traffic. Not all preferences or advantages are prohibited, but only such as are undue or unreasonable.

Texas & Pac. Ry. Co. v. *Interstate Commerce Commission,* 162 U. S., 197, 219; *Interstate Commerce Commission* v. *Railroad Co.,* 145 U. S., 263, 276. What constitutes an undue or unreasonable preference or advantage is not

defined in the act. *Texas & Pac. Ry. Co.* v. *Interstate Commerce Commission, supra.* Whether in a particular instance there has been an undue or unreasonable preference or advantage, or whether the circumstances and conditions of the carriage have been substantially similar or otherwise, are questions of fact, to be proved in each case. *Texas & Pac. Ry. Co.* v. *Interstate Commerce Commission, supra,* (p. 20); *Cincinnati, etc., Ry. Co.* v. *Same,* 162 U. S., 184, 194. And the burden of proof to show the existence of undue or unreasonable preference or advantage rested upon the railway company in the case at bar. *Interstate Commerce Commission* v. *Railroad Co.* (C. C. S. D. Ohio), 43 Fed. 37, affirmed 145 U. S., 263.

In Section 6 of the Act, the railway company relies on part of paragraph 1 and on paragraph 4, which are set forth, *supra,* as amended in 1889 (25 St. L. 855, 856), and as existing at the time the bills of lading in question were issued. The section has been amended at different times since 1889, and particularly by the Hepburn Act in 1906, but those amendments can have no application to this case. Concerning the purpose of the section as it existed when this cause of action arose, the District Court of the Northern District of Illinois in *United States* v. *Hanley,* 71 Fed, 672, in an opinion by Judge Grosscup, said (pp. 674, 675):

> "The Interstate Commerce Act was not intended solely to prevent unjust discriminations. It was meant as well, to prevent extortionate rates, and, looking thereto, provision was made that the carrier should schedule his rates with the Interstate Commerce Commission, and, upon their approval, should publish the same, whereby such schedules should be a fixed and uniform rule of charge during the period of its existence. To make this effective, and so effective that the shipper might not only rely upon it as the maximum of his own expenditure for the transportation, but

> also as the minimum of the expenses of his rival for the same service, it was made unlawful for a carrier to collect or receive from any person a greater or less compensation for the transportation of property than is specified in such published schedule."

In the case at bar, we look in vain for any evidence of extortionate rates, or that any greater or less compensation was charged or received than was authorized by the published schedules of the railway company.

Section 10 declares and fixes the penalties for violations of the Act. Plaintiff in error relies on the last three paragraphs of the section, being the entire section as amended in 1889, except the first paragraph thereof.

By this part of said section it is declared a misdemeanor on the part of the carrier, or any officer or any person acting for it, who, by means of false billing, false classification, false weighing, false report of weight, or by any other device or means, shall assist, suffer or permit any person *to secure less rates than then established.* It it further declared that any person shall be guilty of a misdemeanor who by like means as above stated, shall secure less rates than then established. It is further declared that any person shall be guilty of a misdemeanor, who shall, by payment of money, or other thing of value, solicitation or otherwise secure discrimination in his favor as against any other consignor or consignee in the transportation of property.

In what way the bills of lading in question violate this section, the brief of plaintiff in error does not point out. If it is meant to claim that the shipper by a false representation secured a lower rate than was then in force, and therefore the bills of lading were void, we submit such result does not follow.

The case of *Wells, Fargo & Co.* v. *Neiman-Marcus Co.*, 227 U. S. 469, decided on error to the Texas Court of Civil Appeals, involved the right of a shipper to recover the full value of furs upon which no value had been declared, and where, if the value had been declared, the rate charged would have been higher than that actually charged. It was held the shipper could only recover fifty dollars, the amount stated in the receipt as the limit of recovery under such circumstances. *It was contended by the defendant that plaintiff should recover nothing having been guilty of obtaining an unlawful discrimination in rates.* But, upon this question in the course of the opinion by Mr. Justice Lurton it was said (p. 475):

> "It is undoubtedly true that the principal defense upon which the defendants seem to have relied in the state court was, that by intentional misrepresentation the plaintiff had obtained a rate based upon a valuation of fifty dollars, and that they had thereby secured transportation of the property, for which they sue, at a less rate than that named in the tariffs published and filed by the carrier as required by the acts of Congress regulating commerce, and thus obtained an illegal advantage and caused an illegal discrimination forbidden by the acts referred to. But this defense rested upon the misrepresentation as to the real value declared only in the carrier's receipt, and therefore, involved the consequence of the undervaluation by which an unlawful rate had been obtained. The question at last would be shall the shipper or owner recover nothing because of that misrepresentation, or only the valuation declared to obtain the rate upon which the goods were carried? The latter would seem to be the more reasonable and just consequence of the estoppel. The ground upon which the validity of a limitation upon a recovery for loss or damage due to negligence depends is that of estoppel."

It thus seems to be held by this Court in case last cited that even though an unlawful rate had been obtained the shipper would not thereby be precluded from a recovery,—in other words, *the shipping receipt was not rendered invalid and a recovery might be had thereon according to its terms.*

And this Court has held, concerning the effect of rebates upon bills of lading, in an opinion by Mr. Justice Jackson in the case of *Merchants' Cotton Compress Co.* v. *Ins. Co.*, 151 U. S. 368, 389, decided in 1894, on a cause of action arising shortly after the passage of the original Interstate Commerce Act, and when the sections relied on by plaintiff in error were in substance the same as in 1900, when the bills of lading here involved were issued (last paragraph of syllabus, p. 369):

> *"There is nothing in the Interstate Commerce Act which vitiates bills of lading, or which by reason of the allowance of rebates if actually made, would invalidate a contract of affreightment, or exempt the railroad company from liability on its bills of lading."*

In 2 Hutchinson on Carriers (3d ed.), Section 547, as to the effect of a rebate and special rate on the validity of a bill of lading, it is said:

> "AGREEMENT FOR REBATE DOES NOT VOID CONTRACT OF CARRIAGE.—Although the fact of agreement for rebate and special rate may be proven, it does not prevent liability on the part of the carrier for loss of freight through the carrier's negligence. The law makes agreements as to rebate or special rate void. There is nothing in the law or the policy of it which requires a construction that would excuse a carrier from all liability when it made such a contract in connection with that for receipt and transportation of freight. Such a construction

would encourage rather than discourage such unlawful agreements for rebates. The carrier might prefer them to liability for freight."

To the same effect is 1 Moore on Carriers (2d ed.) p. 155, sec. 14.

The same provisions of the Interstate Commerce Act relied on by plaintiff in error in its brief, and as quoted, *supra*, were relied on by the plaintiff in error in *Pennsylvania R. Co.* v. *Hughes* (1903), 191 U. S. 477, 487, re-referred to at some length, *infra*, paragraph III. In that case, the common law rule of Pennsylvania as to the validity of an agreed value limitation of recovery in a bill of lading, was sustained by this Court, though in conflict with the rule of this Court upon the same question. This Court there said (p. 488) that it looked in vain in those statutory provisions of the Interstate Commerce Act for any regulation of the matter there in controversy. The case at bar as well as the Hughes case involved the question of the validity of a bill of lading. This court, in *Adams Express Co.* v. *Croninger* (1913), 226 U. S. 491, 501-503, also referring to the same statutory provisions and noting the fact of their consideration in the Hughes case, said it would assume that the law as declared in that case was controlling, thus compelling the affirmance of the judgment of the state court, unless the *subsequent* legislation had changed the law, that is, the amendments of the Interstate Commerce Act made since 1889.

From the vague statements on pages 20, 24, 31, 32 and 39 of the brief of plaintiff in error, we are left in doubt as to what provisions of the parts of the Interstate Commerce Act relied on are supposed to render the bills of lading void. The cases cited which hold a bill of lading void when issued without the receipt of the property

described therein announce the rule of the Federal courts on a question of common law, irrespective of any question of interstate commerce and held by them long before the passage of the Interstate Commerce Act. As will be shown later (paragraph III), this rule was not binding on the state courts at the time the cause of action arose in 1900, the state courts being then free to apply their own interpretation of the common law. *Pennsylvania R. Co.* v. *Hughes, supra.*

As we understand the argument of plaintiff in error, founded on this line of cases, it is that a bill of lading issued by an agent of the carrier without the receipt of the property is presumed to be issued without the authority of the carrier. But in the case at bar the evidence shows that the bills of lading were issued on the presentation of receipts from an elevator in the yards of the railway company, in accordance with the established practice of the railway company, and were issued by a clerk in the office of the Assistant General Freight Agent of the company at Kansas City, whose duty it was to perform such service. (Tr., pp. 62, 63, 64.) On this question the Kansas Supreme Court in its opinion (Tr., p. 86) said that *"the proof is ample that the bills of lading were issued by the authority of an officer for whose conduct the defendant must answer."*

Any presumption of lack of authority of the agent to issue the bills of lading is thus overcome by the proof and finding of the court in the case at bar.

Many of the cases cited by plaintiff in error are cases decided under the Carmack Amendment to the Hepburn Act of June 29, 1906, which was passed long after the bills of lading were issued and the suit was begun. It

is thus seen that while plaintiff in error makes no direct claim of the application of the Carmack Amendment to this case, yet he relies on decisions of this Court which derive their force from that amendment and are only applicable on the theory that the amendment governs this case. That the Carmack Amendment does not apply here will be shown in paragraph III hereof.

We have carefully examined the cases cited by plaintiff in error under paragraphs I and II, pages 14-39, of its brief, and the result of such examination follows:

In *Northern Pac. Ry. Co.* v. *Wall,* 241 U. S. 87 (cited brief, p. 14), the cause of action for injuries to live stock transported in interstate commerce arose in 1912, and was decided under the Carmack Amendment. It therefore does not apply to the case at bar.

Friedlander v. *R. Co.,* 130 U. S. 416 (cited, brief, pp. 15, 34), decided on error to the United States Circuit Court for the Eastern District of Texas, was an action for non-delivery of a shipment of cotton. Bills of lading were issued without the receipt of the cotton. That case arose in a Federal court and this Court, following *Shaw* v. *R. Co.,* 101 U. S. 557, 563, and *Pollard* v. *Vinton,* 105 U. S. 7, 8, applied its own interpretation of the common law. No question of interstate commerce was in the case.

The case of *Railway Co* v. *Harold,* 241 U. S. 371, decided on error to the Supreme Court of Kansas, is cited (brief, p. 15), as being to the same effect as the Friedlander case. This is not strictly accurate, because that was an action by an assignee of a bill of lading for delay in delivery of a carload of grain and, while the grain was not then actually in the possession of the railway

company, it was in transit and was received some days after the date of the bill of lading (September 21, 1910). The question of unreasonable delay, as we understand, was made to depend upon whether the date of the bill of lading should be taken as the date when the grain was received. The state court, following its own construction of common law, said that the plaintiff as a purchaser for value was entitled to rely on the recitals in the bill of lading. This Court following its own common law *as reinforced by the Carmack Amendment* reversed the judgment and remanded the case. This case has been reviewed, *infra,* under paragraph III.

It is not in point here as the cause of action arose after the Carmack Amendment which was therefore held to govern that case.

New Haven R. Co. v. *Interstate Commerce Commission,* 200 U. S. 361, is cited (brief, p. 20) as to the general purpose of the Act to Regulate Commerce. It seems to have no special bearing on this case.

Kansas City Southern Ry. Co. v. *Albers Com. Co.,* 223 U. S. 573 as cited (brief, p. 22), deals with some of the purposes of section 6 of the Act. It is without bearing upon this case.

Chicago & Alton Ry. Co. v. *Kirby,* 225 U. S. 155 (cited, brief, p. 23), involved the validity of a discriminating agreement by the carrier to expedite the delivery of a shipment of goods. That contention of the railway company in that case was based in part on the Elkins Act passed in 1903, after the present action arose, which is not applicable here. The facts and decision in that case are without bearing upon this case.

Southern Ry. Co. v. *Prescott,* 240 U. S. 632, cited (brief, pp. 24, 54), was an action to recover for the loss of a shipment of shoes in 1913, thus arising after the passage of the Carmack Amendment and the decision is based thereon. Hence it does not apply to this case.

The case of *Georgia, etc., Ry. Co.* v. *Blish Milling Co.,* 241 U. S., 190, arose in 1913, and is cited to the point that a stipulation for notice of loss cannot be waived under the Carmack Amendment, and being decided under that amendment is not applicable here.

In *Cincinnati, etc., Ry. Co.* v. *Rankin,* 241 U. S. 319 (cited, brief, p. 29), the cause of action arose in 1911 for loss and damage to a car load of mules. It involved the construction of the Carmack Amendment.

Kansas City Southern Ry Co. v. *Carl,* 227 U. S., 639 cited brief, p. 29), was an action for failure to deliver a box of household goods, received for transportation in October, 1907. It involved the validity of a clause in the bill of lading limiting the liability of the carrier. The limitation was sustained. The contract was held to be controlled by the Carmack amendment.

Atchison, etc., Ry. Co. v. *Robinson,* 233 U. S., 173 (cited, brief, p. 30), was an action to recover damages for injuries to a race horse, shipped under an alleged oral agreement. The case was held to be governed by the Carmack Amendment.

Under paragraph III of this brief, we have discussed the Carmack Amendment and its bearing upon a case arising before its passage, and shown that it can have no application to this case.

Pollard v. *Vinton*, 105 U. S., 7, (cited, brief, p. 33), was decided on error to the Circuit Court of the United States for the District of Kentucky. It was held applying the rule of this Court that a bill of lading issued by the agent of a steamboat without the receipt of the goods is invalid, even in the hands of a holder for value. *This decision was based largely if not entirely on the limitation of the authority of the agent. In the case at bar, however, the Supreme Court of Kansas expressly found from the evidence that the officer of the railway company had ample authority to issue* the bill of lading here involved (Tr., p. 85). But in any case the law as declared was not binding on the Supreme Court of Kansas. *Pennsylvania R. Co.* v. *Hughes, supra,* a case arising before the passage of the Carmack Amendment.

The cases of *Shaw* v. *R. Co.*, 101 U. S., 557, *St. L. etc. Ry. Co.* v. *Knight*, 122 U. S., 79, and *Missouri P. Ry. Co.* v. *McFadden*, 154 U. S., 155 (cited, brief, p. 39), are to the same general effect as the *Pollard and Friedlander cases, supra.* All of them came to this Court on writs of error to the Circuit Court of the United States. The law as declared in this court was therefore applied. But as to the case at bar, the Supreme Court of Kansas was free to apply its own interpretation of the law. *Pennsylvania R. Co.* v. *Hughes, supra.*

2. The Judgment of the Supreme Court of Kansas does not constitute a burden, direct or indirect, on interstate commerce.

On page 39 of its brief plaintiff in error claims that the application to the case at bar of the common law of Kansas

and the statute law of Missouri and the judgment in pursuance thereof constitute a direct burden upon interstate commerce. No authorities are cited and no argument is made in support of the proposition.

Undoubtedly, it is time "that speaking generally the states are without power to directly burden interstate commerce", as said in *Rosenberger* v. *Pacific Express Co.*, 241 U. S., 48, 50. It is however, equally true that the states are free to act in many matters, although interstate commerce may incidentally or indirectly be involved. The *Minnesota Rate Cases*, 230 U. S., 352; *Missouri P. Ry. Co.* v. *Larabee Flour Mills Co.*, 211 U. S., 612.

Smith v. *Alabama*, 124 U. S., 465, 473, 474, was considered on writ of error to the Supreme Court of Alabama, and the judgment of that court sustaining the validity of a statute making it unlawful for railway engineers to operate an engine without a license was affirmed by this court. Mr. Justice Matthews, delivering the opinion of the court, said (pp. 474, 475):

> "There are many cases, however, where the acknowledged powers of a State may be exerted and applied in such a manner as to affect foreign or interstate commerce without being intended to operate as commercial regulations. If their operation and application in such cases regulate such commerce, so as to conflict with the regulation of the same subject by Congress, either as expressed in positive laws or implied from the absence of legislation, such legislation on the part of the State, to the extent of that conflict, must be regarded as annulled. To draw the line of interference between the two fields of jurisdiction, and to define and declare the instances of unconstitutional encroachment, is a judicial question often of much difficulty, the solution of which, perhaps, is not to be found in any single and exact rule of decision. Some general lines

of discrimination, however, have been drawn in varied and numerous decisions of this court. It has been uniformly held, for example, that the States cannot by legislation, place burdens upon commerce with foreign nations or among the several states. 'But upon an examination of the cases in which they were rendered', as was said in *Sherlock* v. *Alling*, 93 U. S., 99, 102, 'it will be found that the legislation adjudged invalid imposed a tax upon some instrument or subject of commerce, or exacted a license fee from parties engaged in commercial pursuits, or created an impediment to the free navigation of some public waters, or prescribed conditions in accordance with which commerce in particular articles or between particular places was required to be conducted. In all the cases, the legislation condemned operated directly upon commerce, either by way of tax upon its business, license upon its pursuit in particular channels, or conditions for carrying it on'.

* * *

In conferring upon Congress the regulation of commerce, it was never intended to cut the states off from legislating on all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the Constitution. * * * And it may be said generally, that the legislation of a state, not directed against commerce or any of its regulations, but relating to the rights, duties and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit."

In *Chicago, etc., Ry. Co.* v. *Solan*, 169 U. S., 133, a statute of Iowa was sustained, which prohibited any con-

tract exempting a carrier from liability. In that case the contract for shipment of cattle provided that the carrier should be liable for injury to the owner or the person in charge of the cattle in excess of $500.

In *Field* v. *Barber Asphalt Co.*, 194 U. S., 618, 623, the court, speaking by Mr. Justice Day, said:

> "It is unnecessary to cite largely from cases in this court, which hold that only such acts as directly interfere with the freedom of interstate commerce are prohibited to the states, *Kidd* v. *Pearson*, 128 U. S., 1, in which case Mr. Justin Lamar, speaking for the court, said (p. 23): 'As has been often said legislation [by a state] may in a great variety of ways affect commerce and persons engaged in it, without constituting a regulation of it within the meaning of the Constitution'."

In *Pennsylvania R. Co.* v. *Hughes*, 191 U. S., 477, there is an extended citation of authorities showing that a state is free to act in a variety of ways in the absence of legislation by Congress although interstate commerce may thereby be indirectly affected. Referring there to the limitation of recovery in a bill of lading to an agreed value, which was good in New York, where the contract was made, but void in Pennsylvania where the action was brought, the Court, Mr. Justice Day delivering the opinion, affirming the judgment of Supreme Court of the latter state, said (p. 488):

> "Until Congress shall legislate upon it, is there any valid objection to the state enforcing its own regulations upon the subject, although it may to this extent indirectly affect interstate commerce contracts of carriage?"

And it was further said in the same case (p. 491):

> "We can see no difference in the application of the principle based upon the manner in which the state requires the degree of care and responsibility, whether enacted into a statute or resulting from the rules of law enforced in the state courts."

In *Missouri, etc., Ry. Co.* v. *Harris,* 234 U. S., 412, a case arising since the Carmack Amendment, a Texas statute allowing an attorney's fee in certain actions for claims against a carrier was sustained as not an "unwarrantable interference with interstate commerce in the absence of legislation by Congress", but rather a regulation in aid of the performance by a carrier of its legal duty. The decision followed that in *Railway Co.* v. *Cade,* 233 U. S., 642, in a case also arising since the Carmack Amendment, and brought under the same state statute. To the same effect is the case of *Atlantic, etc., Ry. Co.* v. *Mazursky,* 216 U. S., 122, where the action arose under a similar statute of South Carolina, and the judgment of the state court (78 So. Car., 36) was affirmed. In that case Chief Justice Fuller discussing the question whether the state statute was an unlawful interference with interstate commerce quoted with approval (216 U. S., 133) from the opinion of Mr. Justice Peckham in *Western Union Telegraph Co.* v. *James,* 162 U. S., 650, 660, the following paragraph:

> "The statute in question is of a nature that is in aid of the performance of a duty of the company that would exist in the absence of any such statute, and it is in nowise obstructive of its duty as a telegraph company. It imposes a penalty for the purpose of enforcing this general duty of the company. The direction that the delivery of the message shall be made with impartiality and in good faith and with due dil-

igence is not an addition to the duty which it would owe in the absence of such a statute. Can it be said that the imposition of a penalty for the violation of a duty which the company owed by the general law of the land is a regulation of or an obstruction to interstate commerce within the meaning of that clause of the Federal Constitution under discussion? We think not."

The Chief Justice then cited, as being of like effect in support of the judgment and of the power of the states, the following cases:

Chicago, etc., Ry. Co. v. *Solan,* 169 U. S. 133, 137;
Pennsylvania R. Co. v. *Hughes,* 191 U. S. 477, 491;
Missouri P. Ry. Co. v. *Larrabee Flour Mills Co.,* 211 U. S. 612, 624.

The foregoing decisions show that the states are held to have considerable freedom to legislate in matters which incidentally affect interstate commerce. The cases cited except the Cade case and the Harris case, all arose before the passage of the Carmack Amendment, as did the case at bar. The two cases last mentioned, however, arose after the passage of that amendment, thus showing that the states still are permitted to incidentally deal with the subject.

It would seem that the application by the Supreme Court of Kansas of its own interpretation of the law was a much smaller burden, if it can be called a burden at all, upon interstate commerce than was sustained in the cases cited. It would seem to fall within the class of cases wherein the state action was held to be an aid to interstate commerce, rather than a burden thereon. Certainly, it

would seem to facilitate shipments if consignees may deal with bills of lading in reliance upon their representing property actually in the possession of the carrier. The contrary doctrine, which virtually requires a consignee to investigate the facts as to possession, when the point of origin of a shipment may be hundreds or even thousands of miles distant, would seem to result in impeding shipments made under "shippers' order, notify Blank & Co." bills of lading. This is especially true in the case of grain shipments, with the custom prevailing as detailed in the petition (Tr., pp. 4, 5). This custom is referred to and the benefits to be derived therefrom are stated with great force by the Supreme Court of Kansas in *Savings Bank* v. *R. Co.*, 20 Kan. 519, 522, relied on by that court on first appeal of this case in support of its holding that the bills of lading in question were valid obligations. The court said (20 Kan. pp. 522, 523):

> "Our state is a great producer of grain, large amounts of which seek markets outside of its boundaries. The means of transportation are mainly limited to railroads, and commercial transactions by our grain dealers extend to millions, each year. The great mass of these products, when started to eastern markets, are purchased and paid for through bills of lading. The custom of grain dealers is to buy of the producer his wheat, corn, barley, etc., then deliver the same to a railroad company for shipment to market. The railroad company issues to the shipper its bill of lading. The shipper takes his bill of lading to a bank, draws a draft upon his commission merchant, or consignee, against the shipment, and attaches his bill of lading to the draft. Upon the faith of the bill of lading, and without further inquiry, the bank cashes the draft, and the money is thus obtained to pay for the grain purchased, or to repurchase other shipments. In this way, the dealer realizes at once the greater value of his consignments, and need not wait for the returns of the sale of his grain to obtain money to

make other purchases. In this way, the dealer with small capital, may buy and ship extensively; and, while having a capital of a few hundred dollars only, may buy for cash, and ship grain valued at many thousands. This mode of transacting business is greatly advantageous both to the shipper and producer. It gives the shipper who is prudent and posted as to the markets, almost unlimited opportunities for the purchase and shipment of grain, and furnishes a cash market for the producer at his own door. It enables the capitalist and banker to obtain fair rates of interest for the money he has to loan, and insures him, in the way of bills of lading, excellent security. It furnishes additional business to railroad companies, as it facilitates and increases shipments of produce to the market. A mode of business so beneficial to so many classes, ought to receive the favoring recognition of the law to aid its continuance."

It would seem, therefore, both upon reason and upon authority, that the rule of law applied in the construction of these bills of lading, by the Supreme Court of Kansas, facilitates rather than impedes or obstructs interstate commerce, and is not in any sense a burden thereon, either direct or indirect, but a decided benefit thereto.

III.

EVEN THOUGH THE BILLS OF LADING IN QUESTION CONCERNED INTERSTATE COMMERCE, YET, SINCE THE CAUSE OF ACTION AROSE BEFORE THE PASSAGE OF THE CARMACK AMENDMENT OF THE HEPBURN ACT, THE LIABILITY OF THE RAILWAY COMPANY WAS PROPERLY DETERMINED BY THE LAWS OF KANSAS AND MISSOURI.

In the decision of this case, the Supreme Court of Kansas applied the common law of that state and the stat-

ute law of Missouri, the latter being specially pleaded by the defendant railway company as controlling. Under such common law and the statute law of Missouri, as construed by that court, the bills of lading in question were held to be good and valid obligations as against the railway company in the hands of the plaintiffs, defendants in error here, as innocent purchasers for value.

It is contended by defendants in error that, even though the transactiton was one in interstate commerce, and even though the rule announced by the state court is opposed to the rule as held in the Federal courts on the same question, yet in the case at bar, which arose before the passage of the Carmack Amendment, the Supreme Court of Kansas was free to apply its own interpretation both of the common law and of the statute law of Missouri.

While so contending, we are fully aware of the fact that this court in *Atchison, etc., Ry. Co.* v. *Harold*, 241 U. S. 371, decided on error to the Supreme Court of Kansas, has held that, in a case arising, as did that case, *since* the passage of the Carmack Amendment to the Hepburn Act of June 29, 1906, the common law rule of Kansas, which invests the innocent purchaser of a bill of lading with greater rights than had the original owner and applied by the Supreme Court of Kansas on the first appeal in passing upon the sufficiency of the petition in the case at bar, is superseded as to interstate bills of lading by the Federal rule.

That case differs from the case at bar in important particulars. It arose in September, 1910, more than four years after the passage of the Carmack Amendment. It did not involve the question of the validity of bills of lading because the grain was not received by the carrier, but merely the question whether in an action for delay in de-

livery, the statement in the bill of lading as to the date of the receipt of the grain was to be taken as true. Neither did it involve any question of the statute law of another state and its interpretation by the state court; nor any question of estoppel of the complaining party to claim a Federal right, as in the case at bar, by reason of affirmative action that was absolutely contradictory of the existence of any such right or any intention to specially set up or claim the same.

The chief points of difference between the two cases as above noted, are (1) that the Harold case was decided on a state of facts arising since the passage of the Carmack Amendment, while the case at bar arose before that amendment, and (2) instead of mere non-claim until the rehearing, as in the Harold case, in the present case there was on the part of the defendant railway company affirmative action positively negating the existence of or any intention to claim any Federal right.

We think the first point of difference alone is decisive of this case, since the Carmack Amendment does not apply to past transactions, and under the decisions of this court it is only by virtue of that amendment that state rules and state statutes are superseded by Federal law with respect to interstate commerce.

The last point of difference—the absolute negation by the answer of any Federal right or any claim thereof, would seem to bar such claim in a case arising *after* as well as before the Carmack Amendment. This view is sustained by the case of *Atlantic Coast Line R. Co.* v. *Mims*, 242 U. S. 532, 535, which arose in 1910, in which it is held that a Federal question as to the application of the Federal Employers' Liability Act was presented too late for con-

sideration, and the writ of error was dismissed. This Court said:

> "The plaintiff in error mistakenly argues that under recent decisions of this Court it is not necessary to claim the benefits of the Federal Employers' Liability Act in a pleading in a state court in order to obtain a review here of a decision denying or refusing to consider such a claim. * * * The claim of the plaintiff in error to a Federal right not having been asserted at a time and in a manner calling for the consideration of it by the State Supreme Court under its established system of practice and pleading, the refusal of the trial court and of the Supreme Court to admit the testimony tendered in support of such claim is not a denial of a Federal right which this Court can review."

From what has been said, we submit that the Supreme Court of Kansas was amply justified in holding that the defendant railway company had estopped itself to claim a Federal right in this case.

Recurring to the first point in which the Harold case differs from the case at bar as just mentioned, it appears that this cause of action accrued in June, 1900, and that the suit was begun in March, 1905. Hence, the Carmack Amendment, approved June 29, 1906, could not apply to this case, unless it be given a retroactive effect. That such effect cannot be given to it would seem clear. Thus Section 11 of the Hepburn Act, of which the Carmack Amendment is a part, provided:

> "That this Act shall take effect and be in force *from and after its passage.*"

Where an act so declares, it has been said to be decisive evidence of the intent to confine its operation to the future. 9 Opinions of Attorney-General (Black), 439.

In *Reynolds* v. *McArthur*, 2 Pet. 434, Chief Justice Marshall delivering the opinion of the court, said:

> "The language of the law [as to boundary of Virginia] is entirely prospective. It is a principle which has always been held sacred in the United States that laws by which human action is to be regulated look forwards and not backwards, and are never to be construed retrospectively unless the language of the act shall render such construction indispensable.

This court has held that the Carmack Amendment does not apply to claims arising before its enactment.

Thus in *Charleston, etc., R. Co.* v. *Varnville Co.*, 237 U. S. 597, which arose after the Carmack Amendment was passed and where it was held a state penalty statute could not be applied to an interstate commerce transaction, it appeared that, in support of a judgment under the state statute, reliance was placed on *Atlantic Coast Line R. Co.* v. *Mazursky*, 216 U. S. 122, but this Court in refusing to follow that case in upholding a state penalty statute, expressly called attention to the fact that the claims in the Mazursky case "all arose before June 29, 1906, the date of the Carmack Amendment" (237 U. S. 602).

That the statute is not retroactive is held in *Northern Pac. Ry. Co.* v. *Wall*, 241 U. S. 87, 93, where the Court refused to consider as applicable to the case the change made in the Carmack Amendment by the Act of March 4, 1915 (Chap. 76, 38 St. L. 1196), *"because passed long after this shipment was made."* (Italics ours.)

In *Yazoo & Miss. Valley R. Co.* v. *Greenwood Grocery Co.*, 227 U. S. 1, it appeared from the opinion that the action was for penalties aggregating $58 for delays in deliv-

ering cars to the Grocery Company, and $18 of said penalties accrued after the date of the passage of the Hepburn Act and Carmack Amendment to Section 20 thereof. The right to the penalties was claimed under certain rules of the Railroad Commission of Mississippi. As to the penalties accruing after June 29, 1906, the court held the case was controlled by *Chicago, etc., Ry. Co.* v. *Hardwick Elevator Co.*, 226 U. S. 426, holding that, since the enactment of the Hepburn Act the power of the states as to interstate commerce had ceased. As to the penalties accruing before that date, it was said the above case would not in any event be controlling.

The Carmack Amendment not being applicable to the facts of this case, the Supreme Court of Kansas was free under the decisions of this court to apply its own interpretation both of the common law and of the statute law of Missouri. As to the common law, it was the established doctrine of this Court before the passage of the Carmack Amendment that the decisions of state courts on questions concerning the liability under interstate bills of lading raised no Federal question, because they were free to decide according to the laws of their respective states whether expressed in the form of the common law, or of the public policy of the state, or of a state statute.

Thus, in *Pennsylvania R. Co.* v. *Hughes*, 191 U. S. 477, 485-486, decided on error to the Supreme Court of Pennsylvania, in 1903, this Court, commenting on the holding in *Hart* v. *R. Co.*, 112 U. S. 331, and the holding in New York sustaining contracts between shippers and carriers limiting liability for loss or damage to property in transit to an agreed value held that Pennsylvania was free to apply her own interpretation of the common law, though contrary

to that of the Federal courts and in the opinion by Mr. Justice Day, said (p. 486):

> *"But this is not a question of Federal law wherein the decision of the highest Federal tribunal is of conclusive authority.* In *Grogan* v. *Adams Express Co.*, 114 Pa. St. 523, the Supreme Court of Pennsylvania expressly declined to follow the rule laid down in *Hart Railroad*, adhering to its own declared doctrine denying the right of a common carrier to thus limit its liability for injuries resulting from negligence. The cases are numerous and conflicting, different rules prevailing in different states. The Federal courts in cases of which they have jurisdiction will doubtless continue to follow the rule of the Hart case, *but the highest court of Pennsylvania may administer the common law according to its understanding and interpretation if it, being only amenable to review in the Federal Supreme Court where some right, title, immunity or privilege, the creation of the Federal power, has been asserted and denied. Bethell* v. *Demaret*, 10 Wall. 537; *Delmas* v. *Ins. Co.*, 14 Wall. 661; *Ins. Co.* v. *Hendren*, 92 U. S. 286; *United States* v *Thompson*, 93 U. S. 587." (Italics ours.)

The Court further said in the Hughes case (p. 491):

> "We can see no difference in the application of the principle based upon the manner in which the state requires this degree of care and responsibility, whether enacted into a statute or resulting from the rules of law enforced in the State courts."

That the rule of this court, as to the freedom of the states to follow their own law, remained as declared in the Hughes case until the passage of the Carmack Amendment, is held in the case of *Adams Express Co.* v. *Croninger*, 226 U. S. 491, decided on error to a state circuit court of Kentucky. This fact is expressly noted in *Boston & Maine R.*

Co. v. *Hooker,* 233 U. S. 97, 110, decided on error to the Superior Court of Massachusetts, where it was said (p 110):

> "Since the decision in the Hughes case the Hepburn Act of June 29, 1906, c. 3591, 34 Stat. 584, has been passed, and this court has held that by virtue of that act (particularly Sec. 20, the Carmack Amendment) the subject of interstate transportation of property has been regulated by Federal law to the exclusion of the power of the States to control in such respect by their own policy or legislation. In this connection we may refer to the cases of *Adams Express Co.* v. *Croninger,* 226 U. S. 491; *Wells, Fargo & Co.* v. *Neiman-Marcus Co.,* 227 U. S. 469; *Kansas City Southern Ry Co.* v. *Carl,* 227 U. S. 639; *Missouri, Kansas & Texas Ry. Co.* v. *Harriman,* 227 U. S. 657."

The Croninger case, *supra,* arose after the passage of the Carmack Amendment, and involved the validity of a limitation of recovery to an agreed value, thus raising a similar question to that in the Hughes case, but the conclusion reached was contrary to that in the latter case so that the decision in the Croninger case strongly emphasized the change made by the Carmack Amendment. In the latter case, Mr. Justice Lurton, delivering the opinion of the Court, said (226 U. S. 499, 500, 504, 505):

> "The question upon which the case must turn, is, whether the operation and effect of the contract for an interstate shipment, as shown by the receipt or bill of lading, is governed by the local law of the State, or by the acts of Congress regulating interstate commerce.
>
> * * *
>
> "But it is equally well settled that until Congress has legislated upon the subject, the liability of such a carrier, exercising its calling within a particular State, although engaged in the business of interstate com-

merce, for loss or damage to such property, may be regulated by the law of the State.

* * *

"Prior to that amendment [Carmack Amendment] the rule of carrier's liability, for an interstate shipment of property, as enforced in both Federal and state courts, was either that of the general common law as declared by this court and enforced in the Federal courts throughout the United States, *Hart* v. *Pennsylvania Railroad,* 112 U. S. 331; or that determined by the supposed public policy of a particular state, *Pennsylvania Railroad* v. *Hughes,* 191 U. S. 477; or that prescribed by statute law of a particular State, *Chicago, etc., Railroad* v. *Solan,* 169 U. S. 133.

* * *

"That the legislation [Carmack Amendment] supersedes all the regulations and policies of a particular state upon the same subject results from its general character."

That the decision of the Supreme Court of Kansas as to the meaning of the Missouri statutes, specially invoked by the defendant railway company, is binding upon this court is the effect of the decision in the case of *Eastern Building Association* v. *Ebaugh,* 185 U. S. 114, decided on error to the Supreme Court of South Carolina. The syllabus in that case is as follows:

"This case was presented to the court below with the facts found by the trial court, among which were that under the circumstances it was the law of New York that the plaintiff in error could not be heard to say that its promise was *ultra vires;* and it was decided that such findings of fact were conclusive upon it. This Court holds that the law of New York was a necessary element in the propositions and in it was involved not only what the statutory law is, but what its application is under the courts of that State, both of which were facts to be proved, and the finding upon which was binding on this court."

Whether or not the bills of lading in question were issued by authority of the railway company was a fact settled by the decision of the state court in this case. The Supreme Court in its opinion (Tr., p. 86) expressly finds "that the proof was ample that the bills of lading were issued by the authority of an officer for whose conduct the defendant must answer." This question of fact being thus settled in the state court, is not subject to review in this Court.

Western Union Telegraph Co. v. *Call Pub. Co.*, 181 U. S. 92, 103, and case there cited.

The case of *Southern Ry. Co.* v. *Prescott*, 240 U. S. 632, is cited (brief, pp. 54-55). That was an action to recover for the loss by fire of nine boxes of shoes, in 1913, while in possession of the railway company. It is one of a series of cases following *Adams Express Co.* v. *Croninger*, 226 U. S. 491, in applying the "uniform rule of responsibility" held to have been introduced by the Carmack Amendment. The application of this case to the case at bar is not pointed out, and we see none. The cause of action in the case at bar arose before the Carmack Amendment, when the liability of the carrier for loss or damage to property was determined by the diverse rules existing in the different states and the Federal courts, the courts in each jurisdiction being then free to apply their own interpretation of the law.

Pennsylvania R. Co. v. *Hughes*, 191 U. S. 477, 486.

Plaintiff in error argues under paragraph III of its brief (pp. 42-47) that "the decisions of the Kansas Su-

preme Court on the first and second appeals of this case are not binding upon this Federal Supreme Court, and do not establish the laws of the case in the Federal Supreme Court."

How does this affect the case? It clearly appears from the last opinion of the state court (Tr., pp. 84-86) that it in effect incorporates in its last opinion and makes a part thereof the former opinions. The doctrine of those opinions is affirmed and declared to be the law of the case. So that it may well be said that the effect of bringing the case here on the last decision is to bring with it the decisions on the former appeals, if, and so far as, necessary for the determination of the case. But we fail to see wherein the former decisions are necessary to the disposition of the case on this writ of error.

At the time when this cause of action arose the Supreme Court of Kansas was free to apply its own interpretation of the law as held by this court in *Pennsylvania R. Co.* v. *Hughes, supra,* and other cases. That the state court did so, sufficiently appears by its last opinion. That decision was a final decision holding the bills of lading valid contracts. That decision should be sustained in this Court if it appears that it is in accordance with the law of Kansas, whether that is shown by the decision itself or by any other decision of the Supreme Court of Kansas. This Court has held that when the proper construction of a contract is in controversy, the construction adjudged by the state court would bind the parties in all future disputes. *New Orleans* v. *Citizens Bank,* 167 U. S. 371, 396, citing *Tioga Railroad* v. *Blossburg & Corning Railroad Co.,* 20 Wallace, 137; *Mason Lumber Co.* v. *Buchtel,* 101 U. S. 638.

Plaintiff in error has cited a few cases wherein this Court is claimed to have held that it is not bound by decisions in the same case prior to the decision appealed from. Neither of the cases were brought up from a state court and the cases are distinguishable in other respects, but whether so or not, we cannot see their bearing on any question here for review. If it is decided that the case is properly here for review, then, as we understand, the question is what is the law declared by the Supreme Court of Kansas in its last decision. In the determination of this question, this Court will examine the matter in the light of what the Supreme Court of Kansas has decided whether in this or other cases.

The cases cited from this Court by plaintiff in error concede that the former decisions in the same case may bind the state court, and it follows that the state court had a right to apply the law as therein declared.

CONCLUSION.

Upon the authorities cited and for the reasons stated in the foregoing pages, we submit that it appears:

1. That the Federal question, if any, was not raised at the proper time nor in the proper way.

2. That the judgment of the Supreme Court of Kansas is not in conflict with the Interstate Commerce Act as it was in 1900, when the bills of lading here involved were issued; nor does such judgment constitute a burden upon interstate commerce.

3. That as to bills of lading issued in 1900, as these were, the Supreme Court of Kansas was free to follow and apply its own interpretation of the common law of Kansas and of the statute law of Missouri in deciding this case.

If the court shall be of the opinion that a federal question was not properly raised by plaintiff in error, then we ask that the writ of error be dismissed. If, however, the Court shall be of opinion that the case is properly here, then we ask that the judgment herein of the Supreme Court of Kansas be affirmed with costs.

Respectfully submitted,

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